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Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 43

MORRISON T. WADE and BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Recorder's Court for the City of Detroit (R. 223),[1] denying Appellants' Motion for New Trial, is not reported. Portions of said opinion, reference to which is necessary to ascertain the grounds of the judgment, are reprinted herewith as Appendix A (A-1). The Supreme Court of Michigan wrote no opinion in denying Appellants' Application for Leave to Appeal and Motion for Rehearing (R. 464, 465).

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[1] Citations to the unprinted Record are hereafter: "R. —"; to the printed Appendix: "A. —".

JURISDICTION

(i) This is an appeal from a sentence of conviction in the Recorder's Court of the City of Detroit, Michigan, under Sections 218, 280 and 505 of the Michigan Penal Code, M.S.A. §§ 28.415, 28.491 and 28.773, of conspiracy and commission of the substantive offenses of gross fraud and cheat, and of obtaining money by false pretenses.

(ii) The sentence of conviction in the Recorder's Court was imposed on October 23, 1951 (R. 56). That Court formally denied a timely motion for new trial on March 12, 1953 (R. 56, 223-297). The Supreme Court of Michigan denied Appellants' timely Application for Leave to Appeal on October 7, 1954 (R. 464), and their timely Petition for Reconsideration on October 20, 1954 (R. 465). Amended Notice of Appeal to the United States Supreme Court was filed with the Clerk of the Recorder's Court for the City of Detroit as "the court possessed of the record", Rule 11.1, Rules United States Supreme Court, on December 28, 1954 (R. 473). Upon Appellants' timely application, the time for docketing the cause was extended by Judge John A. Ricca, Judge of the Recorder's Court, to and including March 31, 1955.

(iii) The constitutional validity of the state statute in question having been sustained below, the jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. § 1257(2).

(iv) The jurisdiction of this Court is believed to be sustained by *Winters* v. *New York*, 333 U. S. 507 (1948). See also *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164 (1919); *Tumey* v. *Ohio*, 273 U. S. 510 (1927).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Public Acts 1917, No. 196, as amended by Public Acts 1921, No. 395, Mich. Comp. Laws 1929, §§ 17217 and 17218, M.S.A. § 28.943 and § 28.944, commonly known as the Michigan judge-grand jury statute,

and the Fourteenth Amendment to the Constitution of the United States. They are set forth in Appendix B (A-36 et seq.).

The statute was amended, subsequent to the judge-grand jury proceeding here, in 1949 to substitute a grand jury made up of three judges, Public Acts 1949, No. 311, but a second amendment, Public Acts 1951, No. 276, reinstated the previous one-judge system, supplementing it with certain new provisions, M.S.A. § 28.943 and § 28.944. In Appendix A the new material is indicated by italics (A-36).

QUESTIONS PRESENTED

1. Does the Michigan judge-grand jury statute, either generally or as applied in this case, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. Does such a statute, authorizing criminal prosecution pursuant to the complaint of the judge-grand jury, violate the due process clause in that the criminal charge represents not merely an accusation but a judicial finding of probable guilt which destroys the presumption of innocence inherent in our system of criminal justice?

3. Does such a statute violate the due process clause when the complaining grand juror is a judge of the same circuit from which the petit jury is drawn?

4. Does such a statute violate the due process clause by destroying the independence and impartiality of both the judges who sit as inquisitors and those who preside at trials on charges filed by other judges?

5. Can such a statute be constitutionally applied unless the witnesses, the prosecution and the trial judge scrupulously avoid mention in the jury's presence of the fact that a local judge initiated the prosecution?

6. Were appellants denied the fair and impartial trial required by the Fourteenth Amendment because the charge

was initiated by a judge-grand jury of the same court as that in which the trial occurred, and that fact was repeatedly emphasized by the prosecution, the witnesses and the court to the petit jury!

STATEMENT OF THE CASE

In brief, this appeal challenges the constitutionality of the Michigan one-judge grand jury statute discussed heretofore by this Court in *In re Oliver*, 333 U.S. 257 (1948). Appellants' conviction of fraudulent solicitation of charitable contributions followed the longest criminal trial in Michigan history. The charges were first made by a formal Process issued by a single judge of the Michigan Recorder's Court, following a five-month inquiry by that judge acting alone as a grand jury. Appellants contend that accusation by a judge-grand juror fatally prejudiced their case before the petit jury, that their conviction was not justified by the actual evidence and was unconstitutional.

1. The One-Judge Grand Jury Investigation

The case arose out of the operations of the Society of Good Neighbors, a non-profit charitable organization of which appellants Morrison T. Wade and his wife, Bessie Lou Wade, were members of the Board of Trustees. "[T]his criminal proceeding was instituted" (R. 37) by one-judge grand jury called pursuant to a formal Petition in the Recorder's Court for the City of Detroit on February 2, 1948, filed by James N. McNally, Prosecuting Attorney for Wayne County, and Eugene F. Black, Attorney General for the State of Michigan. Invoking the statute here challenged, Section 17217, Comp. Laws, and requesting the appointment of a one-judge grand jury, this Petition stated, in general terms, that "certain persons . . . have combined and confederated . . . in a conspiracy or conspiracies to commit certain crimes" including "gross cheats," "larcenies" and "certain other crimes" not named (R. 466). It further stated (R. 467):

> "Petitioners are unable at the present time to state the name or names of the offender or offenders involved but the identity of such offender or offenders may be axcertained [sic] through the investigation hereinafter prayed for, and that there is probable cause to suspect that John Doe and/or Richard Roe and/or Mary Doe and/or Mary Roe are guilty of such crimes and offenses."

The prayer of the Petition was granted on the next day. Judge Gerald Groat, Presiding Judge of the Recorder's Court, appointed himself as grand juror "to inquire into the matters set forth in the petition" (R. 469). Despite the broad language of the Petition, the inquiry as it developed was solely concerned with the Society of Good Neighbors and the Wades.

Early in the grand jury proceedings the Court, under the guise of a subpoena, ordered all the books and records of the Society taken into custody. These amounted to thirteen four-drawer file cabinets, numerous cartons of papers, ledgers and check stubs (R. 228). This action brought the work of the charity to an abrupt halt; the material was never returned (R. 227-228, 329).[2] On the basis of the information gleaned from this material by his thirty-man staff, Judge Groat issued several hundred other subpoenas compelling the testimony of persons connected with the Society or the Wades. These were sworn and interrogated in secret concerning all the phases of the work of the organization, including the accounting practices, the methods of soliciting contributions of cash and waste, and the case-by-case distribution of funds and material to the poor.

The Wades were also subpoenaed. They were examined by the Court at great length and were denied the right to

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[2] Counsel for appellants was not permitted to study these records during the grand jury investigation—or indeed at any time after they were taken by the grand jury staff until the trial began. And even then he was permitted to work with the material only during the trial or in short recesses, and then in the court room (R. 228, 329, *et seq.*).

have counsel present. Their personal files were "broken into" twice in 1948, and when Wade requested a police investigation of the matter, the authorities refused it (R. 275-78). Some of this material was apparently used directly in the one-judge grand jury investigation (R. 276-277). Wade's business office was ransacked five times during 1948. (*Ibid.*)

This judge-grand jury investigation lasted five months. It culminated on June 19, 1948, in the issuance of a Process ordering the arrest of the appellants signed by Judge Groat of the Recorder's Court. (R. 299 *et seq.*) This Process was issued under the statute challenged here. § 17218. It contains the court's conclusion that an "offense [had] been committed and that there [was] probable cause to suspect [some] person to be guilty thereof." (*Ibid.*) Adopting the general language of the Petition for a Grand Jury, *supra*, the Process issued by Judge Groat in this case charged the commission of four offenses, including two conspiracies involving more than twenty named persons, but found cause to believe in a commission of these offenses only by the two Wades (R. 299 *et seq.*).

It was this Process "upon which defendants were arrested and the present proceeding initiated." (R. 36). They neither pleaded guilty nor not guilty to the charges, but "stood mute on their pleas" (*Ibid.*). They also moved to dismiss the Process on the ground, among others (R. 459):

> "That the One-Man Grand Jury Law . . . is unconstitutional because it threatens to and does deprive defendants of their liberty without due process of law . . . in violation of Section 1, of the 14th Amendment of the Constitution of the United States."

The Motion was denied on July 19, 1948 (R. 37) and thereafter, following the filing of an Information (R. 310 *et seq.* 317), they were arrainged on May 12, 1949, by another judge of the Recorder's Court (R. 37).[3] The Information

[3] Prior to arraignment the Court conducted a fifty-four day preliminary examination of some 120 witnesses (R. 23).

was for all practical purposes identical with the Process issued by the judge-grand juror, and like it charged the substantive offenses of gross cheat and frauds and conspiracies (R. 310).

2. The Trial

When the case came to trial in the Recorder's Court for the City of Detroit, one judge of that court had already passed on appellants' probable guilt. Furthermore, the judge-grand juror's investigation had been extensively reported in the press of Detroit (R. 9, 124-125, 155, 327, 328). In the process of appointing the jury from the panel of twenty presented for this trial, it was discovered that each one admitted having heard or read about the inquiry in the newspapers, and that nine of the twenty had already formed firm opinions of the guilt of the defendants as a result of the Court's charge (R. 155).[4]

The prosecution's theory of the case before the jury rested on the charge, as stated on appeal in the Michigan Supreme Court, that the Wades had committed fraud; "through the use of charitable appeals in the name of [the Society they] obtained goods, monies and articles of value . . . and misappropriated, misused and applied such money

[4] Defendants had moved for a change of venue on the ground of prejudice from this publicity of the judge-grand juror's charge, alleging that "so much adverse publicity has been given defendants . . . that the defendants cannot possibly have a fair trial within the City of Detroit" (R. 327; see also R. 328). This Motion was argued before Judge Gordon on the same day that he heard the Motion to Dismiss. On the next day Judge Gordon entered an order denying only the Motion to Dismiss and "left" for permanent residence in Florida. (R. 39). But when defendants sought to reargue the Motion for a Change of Venue on the ground that newspaper reports of the grand jury investigation made fair trial impossible the second judge refused to act on it because an informal letter from Judge Gordon, stating that he had meant to deny that Motion, was thought to amend the Docket (R. 39, 332). Thus no proper hearing on the prejudice motion was ever held.

and articles to their own use instead of to the relief of the poor . . . " (R. 53).

It relied largely on the circumstantial proof in the books of account of the Society (See R. 440-441). Its chief witness was an accountant named Jack Friedman (R. 70-82-D). The prosecution identified and introduced this voluminous documentary evidence through him. It also qualified him as an accounting expert to testify concerning his own interpretation and audit of this material. The documentary evidence was the same material which had been confiscated by the judge-grand jury; Friedman's audit had originally been prepared in cooperation with the grand juror's staff and submitted to him. Friedman's testimony contains constant reference to the grand jury. He explained that he had originally acquired the books of account several days after the grand jury was authorized, and under its authority (R. 70). From this material he had prepared the audit (R. 70 *et seq.*) The figures concerning annual personal withdrawals by the Wades (R. 71-79) had first been prepared at the time of the grand jury (see R. 82-82A). His testimony concerning gross income of the Society at trial was the same as that testimony at the inquiry (R. 82-C). Thus, in effect, Friedman emphasized that the massive accounting material which the prosecution relied on to support the charge of "misuse," as well as his conclusions, had already been submitted to and seen—and believed—by the judge of the Recorder's Court who made the original charge.

Other prosecution witnesses mentioned the grand jury proceedings and the evidence there adduced (R. 84, 91). Some of the testimony before the grand jury was read directly to the petit jury (R. 184). Parts of it were used by the prosecution to impeach defense witnesses (R. 165). However, when the defense attempted to examine the context of these impeaching statements in the grand jury transcripts for purposes of rehabilitation they were refused the opportunity to do so (R. 177). And they were

also denied access to grand jury evidence which might have been useful for impeachment of prosecution witnesses (R. 264).

The prosecution mentioned the judge-grand jury investigation several times in his closing, particularly to point up the inconsistent grand jury and trial testimony of some of the witnesses (R. 179, 184). And at the outset of his charge the Court emphasized the fact that the proceeding had been initiated by the judge-grand jury by stating:

> "The fact that these defendants have been arrested, brought into this court, and confronted with the trial, is a matter of procedure, and is not, in and of itself, evidence of guilt. In this connection, you have no right to be influenced by the fact the defendants have been brought into this court through the action of a one-man grand jury." (R. 382).

> "The defendants Morrison T. Wade and Bessie Lou Tanner Wade were charged with the offenses which have been read to you in the Information, said Information and the complaint on which it was based having arisen out of a one-man grand jury." (R. 383).

Thereafter he drew repeated reference to the grand jury proceedings in his outline of the defendant's theory of the case, and the accusation that the grand jury proceeding was politically-inspired and motivated by an intent to harass the Wades (R. 412-418). He closed his charge with this significant reminder:

> "I further charge you that in arriving at a verdict in this cause, you have the right to take into sonsideration [sic] the logical sequence of events leading up to the defendants' arrest on the charges made against them." (R. 444-445).

3. The Verdict

Defendants moved for a directed verdict both at the close of the prosecution's case on July 17, 1951 (R. 54, 339), and at the end of the trial (R. 54, 346). Both motions were denied (R. 54) and the case went to the jury on a general

charge of fraud on the 105th day (R. 223). Following the verdict of guilty defendants made their Motion for a New Trial on grounds, among others, that the one-judge grand jury statute violated the Fourteenth Amendment (R. 113). The Recorder's Court held this ground "untenable" (R. 223).

A new trial should also have been granted as a result of evidence of jury tampering. In addition to the references to the grand jury proceedings at trial, one of the jurors was shown to have lived next door to one of the members of the police department attached to the Recorder's Court (R. 201-05). She had denied this fact on voir dire (R. 154-55). Affidavits of the jurors obtained after the verdict decision demonstrated that her presence on the jury had had great effect on the verdict (R. 213-21).[5]

Following the trial court's ruling on March 12, 1953 (R. 56, 223 *et seq.*), appellants were sentenced and filed their timely application for Leave to Appeal to the Supreme Court of Michigan (R. 1 *et seq.*, 56). This raised again the constitutionality of the one-judge grand jury statute under which the proceedings against them had been instituted (R. 464F). It was denied by the Supreme Court on October 6, 1954 (R. 464). A timely Petition for Reconsideration was denied on October 20, 1954 (R. 465).[6]

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[5] Furthermore, as the court stated, several of the jurors were visited by Detroit police officers during the course of the trial; "one of them was asked if he had been threatened and the other was asked if, or was told they were under surveillance." (R. 23-33, 45-52, 203-5, 246).

[6] The Recorder's Court and the Michigan Supreme Court also denied requests to stay the proceedings and ordered Wade committed and his wife released on probation. Application was made to Mr. Justice Reed for an order granting bail to Wade, and staying the proceedings as to his wife, on the ground that an appeal was contemplated involving the substantial question of the constitutionality of the one-judge grand jury statute. This application was granted on November 1, 1954. The Amended Notice of Appeal was filed on December 28, 1954 (R. 473), and the Recorder's Court extended the time for docketing the appeal to and including March 31, 1955.

ARGUMENT

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal challenges the constitutionality of the Michigan one-judge grand jury system.[7] It is based on the contention the Fourteenth Amendment forbids a state to aggregate in one judge the combined powers of a policeman, grand jury and court, and that appellants' conviction following judicial indictment violated their rights to due process of law.[8]

A. The One-Judge Grand Jury System Is Not In Accord With Due Process of Law

1. INDICTMENT BY THE COURT DESTROYS THE PRESUMPTION OF INNOCENCE: The Michigan one-judge grand jury system replaces the traditional twenty-three man grand jury drawn from the private citizens of the jurisdiction with a single member of the judiciary. It lodges in one judge the unusual powers of criminal investigation and inquisition. He may be appointed to investigate a wide area of suspected criminal activity as a result of the petition under the statute. Once empowered, it is within his discretion to set the bounds of the inquiry and to hear what testimony he will. He is aided by a large staff which he selects and appoints. He has unfettered power to subpoena witnesses and documents. He may summarily punish for contempt either for refusal to appear or answer or for answering falsely. Proceedings are secret. They "can be carried on day or night, in a public place or a 'hide out,' a courthouse, an office building, a hotel room, a home, or a place of busi-

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[7] The statute has been amended since the proceedings here, but the amendments do not change its essential provisions. See A-36.

[8] It is fundamental that a defendant may challenge unconstitutional error in grand jury proceedings in spite of a subsequent petit jury conviction. See *Carter* v. *Texas*, 177 U.S. 442 (1900); *Pierre* v. *Louisiana*, 300 U.S. 354 (1939). And this is especially clear where, as here, the challenge is based on the claim that it was the very grand jury accusation which prejudiced the later trial.

ness." *In re Oliver*, 333 U.S. at 263. And following this inquiry, it is the court's individual responsibility to file Process, charging the commission of a criminal offense.

Such a charge is clothed with all the respectability of the judiciary. It stands on a different plane than an indictment by lay grand jury, or information by the prosecuting attorney. The court, in effect, declares that his plenary inquisition has demonstrated the probable guilt of the accused.

Proceedings such as those in this case destroy any possible presumption of innocence in favor of the defendants. The complaint here was no longer merely an accusation.[9] The court had conducted what was in fact, if not in name, a five-month trial of all the evidence later submitted to the jury and had announced his judgment on the proof. He said in effect that from the evidence he had seen that it was probable that the average jury would convict the Wades. Each of the jurors knew of the charge (R. 155). It would be unrealistic to deny the effect of such a finding on the minds of the petit jurors. Unlike the ordinary grand juror, the judge-accuser is not a mere layman, unskilled in the complexities of the law. Nor is he an adversary as is true where a prosecutor is the accuser.[10] He is and ought to be a symbol of impartiality; his judicial acts, including such findings of probable cause of the commission of a crime, are given great weight by the public and the bar. In a criminal proceeding like this, a judge's "lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States*, 153 U.S. 614, 626 (1894). The petit jury could not, in the nature of things, apply a presumption against such a finding of probable guilt by the court, as it could to a non-judicial indictment or information. The accusation has already been approved by the judge.

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[9] See *In re Oliver*, 333 U.S. 257 (1948); *Tot* v. *United States*, 319 U.S. 463, 466 (1943).

[10] Compare *Hurtado* v. *California*, 110 U.S. 516 (1884).

A Michigan commentator has aptly described the plight of a defendant enmeshed in such a proceeding:[11]

> "The appointment of a circuit judge to act as an accuser has a very practical disadvantage to an innocent citizen. It has the effect of largely nullifying the benefit of the presumption of innocence, a term we use so commonly that we are likely to forget that it is one of the most valuable rights of the innocent. The circuit judge, particularly in a small community, uniformly occupies a very high place in the confidence of his constituents. As a prolific source of news he is cultivated by the press. His name is before the people day by day. The high regard in which he is held is very fortunate from the standpoint of sustaining the dignity of the court and encouraging respect for the judiciary. But not so fortunate are the consequences to the innocent citizen who is charged with crime by a circuit judge acting as an inquisitor. The very fact that the county's most respected citizen makes the charge is taken as evidence of the defendant's guilt, and the presumption of innocence becomes for him a meaningless phrase."

The system is therefore plainly at war with basic concepts of procedural fairness. No other jurisdiction in the nation prejudices criminal defendants in this fashion. There is no analogy to it in the whole history of Anglo-Saxon criminal procedure.[12] The common law since the

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[11] Gallagher, *The One Man Grand Jury—A Reply*, 29 J. Am. Jud. Soc. 20, 22 (1945).

[12] The common law system of non-judicial indictment was firmly established at the close of the middle ages. Thus the canon law practice of instituting criminal prosecutions without the necessity of an accuser, which ultimately found its way into French civil law and into the proceedings of continental Inquisition courts during the Renaissance, gained no foothold in England. See 5 Holdsworth's *History of English Law* 168-78 (1927). Even the procedure of the Star Chamber under the statute *Pro Camera Stellata*, 3 Hen. 7, c. 1 (1487) required "a bill or informacion put to the seid Chauncellor . . ." before actual criminal process of the court itself could begin. See 16 Selden Society, 1 *Select Cases in the Star Chamber*, x, xiv-xxvii (1902); also 25 Selden Society, 2 *Select Cases in the Star Chamber* (1910).

Magna Carta has known but three methods of instituting criminal process: indictment by the grand jury, information by the state and appeal by a private citizen. In England, it was long the rule that the traditional grand jury was required in treason and capital cases; in this country in the federal courts the Fifth Amendment demands a grand jury in proceedings involving "infamous" crimes while the states, since *Hurtado* v. *California*, 110 U.S. 516 (1884),[13] have experimented widely with such techniques as informations, private complaints and grand juries of reduced size.[14] But none of these variations, with the one Michigan exception challenged here, actually transfers bodily to the judiciary the functions of investigation and accusation. The judiciary never has and cannot have any part in the institution of criminal proceedings. The courts have no power to accuse. As stated by Erskine in his famous argument before the King's Bench in support of a new trial in the *Dean of St. Asaph* case:

> "If a man were to commit a capital offence in the face of all the Judges of England, their united authority could not put him upon his trial:—they could file no complaint against him, even upon the records of the supreme criminal Court, but could only commit him for safe custody . . ."[15]

And this is so because the jury system plainly cannot work when the courts issue the charge. Basic fairness in jury cases require that they be immune from influences which will impair their objective weighing of the evidence. See *Moore* v. *Dempsey*, 261 U.S. 86 (1923). Judicial ac-

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[13] For criticism of the *Hurtado* holding that the Fourteenth Amendment permits the states to adopt procedures inconsistent with the Fifth, see Rutledge, concurring, *In re Oliver*, 333 U.S. 278, et seq. (1948); 2 Crosskey, *Politics and the Constitution* 1134-1141 (1953).

[14] The various state systems are reviewed in Orfield, *Criminal Procedure from Arrest to Appeal* 135-265 (1947).

[15] 1 Ridgway, *The Speeches of Thomas Erskine* 275-76 (1813).

cusation is such an influence, just as are biased comments on the evidence by the court, *Quercia* v. *United States*, 289 U.S. 466 (1933), or expressions of opinion as to the guilt or innocence of the accused, *Starr* v. *United States*, 153 U.S. 614 (1894). These plainly destroy the right to a fair and impartial trial. It is basic that "the authority of the bench be not exploited toward a conviction [the court] may privately think deserved or even required by the evidence."[16] But where, as here, the accusation comes from the court itself the defense is fatally prejudiced. Such unfairness is inconsistent with the Fourteenth Amendment.

2. THE ONE-JUDGE GRAND JURY SYSTEM INVADES THE INDEPENDENCE OF THE JUDICIARY: The corrosive effects of this system are not limited to its impact on the function of the petit jury; as well, it raises a serious constitutional question in terms of the impartiality of the courts. Under this system, the judiciary has the duty to investigate, and accuse of, crime and the correlative responsibility of sitting on cases involving such official accusations.

The "commingling"of investigative and adjudication functions has recently been invalidated in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). There, petitioner was an alien whose deportation hearing had been conducted by an immigrant inspector of the Immigration Service. Although he had not been responsible for the investigation of the alien status of Wong,

> "the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorow his investigation of a case may be heard before the inspector whose case he passes on today." 339 U.S. at 45.

This fusion of separate duties, the Court said, was prohibited by the Administrative Procedure Act, 60 Stat. 237,

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[16] *United States* v. *Brandt*, 196 F. 2d 653, 656 (2d Cir. 1952).

240, 5 U.S.C. § 1001 *et seq.*, 1004(c). It rejected the Government's contention that since the Act in terms applied only to hearings required by statute, hearing and investigation by the same person in the immigration field was permissible. The absence of an impartial hearing in the scheme

> "might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." 339 U.S. at 50.

Similarly, a judge exercising the power to make official charges of criminal activity cannot meet "currently prevailing standards of impartiality."

The warning of Mr. Justice Cardozo in another context is forceful here, *Matter of Richardson*, 247 N.Y. 401, 407, 411-12, 160 N.E. 655, 656, 657 (1928):

> "A preliminary investigation, thus restricted, is not a hearing by a judge. It is a search by an inquisitor.
>
> • • • • • • • • •
>
> "The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor. The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work." [17]

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[17] The underlying principle, that the judiciary be not called upon to perform non-judicial tasks, is as old at least as *Hayburn's Case*, 2 Dall. 409 (1792). See also *United States* v. *Ferreira*, 13

Here, too, the judge's "conclusion is to be announced upon a case developed by himself." That conclusion is in form limited to "probable cause" of the defendants' guilt. But the process is no less damaging for this fact. The investigating judge casts his lot with the validity of his accusation. His reputation may, and often does, depend on it. He has announced a conclusion of guilt before trial, something plainly inconsistent with his responsiblity as a court.

Judicial endorsement of a case leaves its mark upon the trial judge who presides over it as well. He cannot be insensitive to his colleague's interest in the outcome of the proceeding. A favorable ruling for the defendant may oppose or cast doubt upon his brother's determination of the same question. The next time he may be the judge-grand juror and his colleague the trial judge.

In short, by thrusting upon judges the investigative and accusatory function that "is not a judge's work," *Matter of Richardson, supra*, the one-judge grand jury system makes prosecutors of the court. It destroys the strict judicial impartiality which the Federal Constitution commands. *Wong Yang Sung* v. *McGrath, supra.* A grand jury assignment is a notorious highway to political success in Michigan. Innumerable judges have exploited it solely for public acclaim and prominence. Sensational charges—such as the one in this case—which are later successfully prosecuted are an accepted technique for judicial advancement. The temptations of the system are inconsistent with fair trial; the politics of a prosecutor's office have no place on the bench. In the words of Chief Justice Taft in *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927):

How. 40 (1852). The language of the *Ferreira* opinion is applicable here (13 How. at 51): "The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or specific powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws."

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold balance nice, clear, and true between the state and the accused denies the latter due process of law."

This, we contend, is such a procedure.

B. As Applied, the One-Judge Grand Jury System Deprived the Appellants of Due Process of Law

Appellants' convictions demonstrate its evils. They were condemned long prior to the petit jury trial by the Recorder's Court itself. The judge-grand juror's Process recited as a fact that they had unlawfully conspired "together and among themselves" and twenty other persons "to obtain and acquire unto themselves of and from citizens of the City of Detroit, . . . money, goods, chattels and other things of value, . . . with intend [sic] to cheat and defraud . . ." In this process the one-judge grand jury also found *cause* to believe that appellants Morrison T. Wade and Bessie Lou Wade *were guilty of the crimes charged.*

Thus, when the case was brought to trial appellants were already under the cloud of a judicial finding of probable guilt. The jury which heard the case was sitting in the Recorder's Court of the City of Detroit, of which the grand juror was one of the judges.

This fact was not lost on them. The prosecution was not content merely to remind the jury that a judge had returned the indictment. In effect, it also brought out that the evidence adduced at trial was the same evidence on which the court had based its finding of probable cause and that in fact certain of this evidence could be vouched for as having been prepared by the judge's own staff. Thus, in identifying certain cartons of exhibits, the people's witnesses were asked to state that the material had been originally confiscated for use before the judge-grand jury;

Friedman, the prosecution's accounting expert, mentioned the grand jury proceedings many times and stated that some of the exhibits prepared by him and introduced at trial had also been submitted to the grand jury in its proceedings (R. 70 *et seq.*, 177).

This technique for emphasizing the high source of the original charge and the evidence has an effect on the jury which is irremediable. It was reinforced by the trial judge himself when he charged (R. 382, 383):

> "The fact that the defendants have been arrested, brought into this court, and confronted with the trial is a matter of procedure, and is not, in and of itself, evidence of guilt. *In this connection, you have no right to be influenced by the fact that the defendants have been brought into this court through the action of a one-man grand jury.*" (Emphasis added.)
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> • • • • • • • • • •
>
> "The defendants Morrison T. Wade and Bessie Lou Tanner Wade were charged with the offenses which have been read to you in the Information, *said Information and the complaint on which it is based having arisen out of a one-man grand jury.*" (Emphasis added.)

If the one-judge grand jury statute is not otherwise invalid under the Constitution, elementary concepts of due process dictate that it cannot be constitutionally applied unless the prosecutor and the witnesses carefully abstain from mentioning to the jury the fact of the judge's sponsorship of the proceedings. This is especially so in a close case like this. Despite the enviable reputation of the Society of Good Neighbors as a charitable enterprise, the Recorder's Court, at the instigation of the prosecuting attorney, conducted a five-month investigation of what it labled a conspiracy to conduct a fraudulent charity involving some forty persons. Only two of these were ever charged. They were brought to trial in a prejudicial atmosphere. Their guilt had already been found as a matter of probability by the very court in which the trial took

place. The prosecution emphasized that the charge had come from a judge, and that the evidence had been seen and believed by him. Police visited jurors. One of the jurors failed to disclose on voir dire her acquaintanceship with a member of the police force attached to the court. And the trial judge himself emphasized the court's formal accusation in his charge.

In such an atmosphere, whether "misuse" of funds was actually proven by the accounting practices relied on by the prosecution is doubtful. The intent evidence was, to say the least, ambiguous. The trial was the longest ever held in a Michigan court; the accounting proof was incredibly complicated. In such a case the prosecution and the court had an unusually heavy responsibility to isolate the jury from extra-legal influences—of which the high source of the charge was certainly one. The injection of this fact into these proceedings was grossly prejudicial and unfair.

C. The Federal Questions Are Therefore Important

We think therefore that this appeal presents a serious and important issue under the Due Process Clause of the Fourteenth Amendment. The time is ripe for a decision. Michigan passed its one-judge grand jury statute in 1917. *In re Oliver*, 333 U.S. 257 (1948), was the first proceeding involving it in this Court. Petitioner had been convicted of contempt by a judge sitting as a grand jury and, on certiorari, the judgment was reversed on grounds that the conviction, having occurred *in camera* and without opportunity to defend or have counsel, violated due process. Though the opinion specifically ignores any challenge to the general "power of Michigan to grant inquisitorial grand jury power to a single judge . . . ", 333 U.S. at 264, Mr. Justice Rutledge, concurring, stated his view that "this

aggregated authority" was clearly unconstitutional, 333 U.S. at 278 *et seq.*[18]

The Court has already granted certiorari this term in *In re White*, No. 405, also from Michigan and involving, like *Oliver*, the validity of a contempt conviction for perjury during the one-judge grand jury investigation. Included among the questions presented is one challenging the constitutionality of the statute generally. We think that the grant of certiorari there is a demonstration of the importance of the issue presented here, and we urge that a full exploration of the one-judge grand jury calls for a simultaneous adjudication of both this case and *White*. The Court should now decide for all time the question which it left open in *In re Oliver, supra*.

Respectfully submitted,

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[18] The issue was presented in *Omacht* v. *Michigan*, appeal allowed September 20, 1950, but, before it could be heard in this Court, the Michigan Supreme Court reopened the proceeding and granted the appeal. The opinions below in *Omacht*, including *People* v. *Hancock*, 326 Mich. 471, 40 N.W. 2d 689 (1950) and *People* v. *Omacht*, 326 Mich. 505, 40 N.W. 2d 704 (1950) are the most recent discussion in the Michigan Supreme Court of the constitutional issues here presented.

APPENDIX A

[223]

OPINION

After 105 days of jury trial, the defendants, Morrison T. Wade, and Bessie Lou Tanner Wade, on September 14, 1951, were found guilty on each of the four counts of an information charging them with (Count One) conspiracy to cheat and defraud; (Count Two) conspiracy to obtain property under false pretenses; (Count Three) gross fraud and cheat; (Count Four) obtaining property under false pretenses. This case involves the claimed acts of the defendants in obtaining, handling and disposing of certain moneys, goods, things of value from the citizens of Detroit through and by means of the use of the offices, equipment, staff, books, records and bank accounts of The Society of Good Neighbors, a non-profit corporation. Certain phases of some of the background of this case and the one-man grand jury proceedings out of which the complaint herein issued have already been before the Supreme Court of Michigan and the Federal Courts. See: *Society of Good Neighbors* v. *Mayor of Detroit,* 324 Mich. 22; *MacGriff* v. *Toy,* 327 Mich. 200; *MacGriff* v. *Van Antwerp,* 327 Mich. 200; *Wade* v. *McNally,* 327 Mich. 200; *Society of Good Neighbors* v. *Groat, Judge of Recorder's Court et al,* 77 Fed. Supp. 695.

The defendants filed a Motion for New Trial claiming 61 grounds therefor and have added 107 more claimed reasons in a Supplement to Motion for New Trial for the filing of which leave was granted. The Court will consider the 168 claimed reasons in the order listed in the Motion and Supplement unless otherwise hereinafter indicated. However, inasmuch as there is a duplication of numbers in the Motion and Supplement it will be necessary to consider them under separate divisions of this opinion, the numbers herein corresponding to the respective paragraph numbers of the Motion or Supplement.

MOTION FOR NEW TRIAL

—1 and 2—

1 and 2, Defendants claim that the so-called one-man grand jury law (C.L. 1929, Sections 17217 and 17218; Stat. Ann. Sections 28.943 and 28.944) was unconstitutional as being in violation of Section 4 of Article IV of, and Section 1 of, the 14th Amendment to the Constitution of the United States is untenable. Re: *Slattery*, 310 Mich. 458; *People* v. *Hancock*, 326 Mich. 471 at 478 and 491.

In *In Re Slattery*, 310 Mich. 458 at 466, the Michigan Supreme Court said:

> "When a complaint has been filed by the Attorney General, it became incumbent upon the judge as a circuit Judge to make an investigation. He was neither a prosecuting attorney, policeman or detective. He had judicial duties to perform and he proceeded in a judicial capacity."

—3—

3. Defendant's objection that the failure to file a sworn complaint or indictment prior to issuance of process was a denial [224] of equal protection of the laws and violation of due process under Section 1 of the 14th Amendment to the Constitution of the United States is untenable for the reason that the so-called one-man grand jury statute did not require any other sworn complaint than that provided for in Section 17218, Compiled Laws of 1929, (Stat. Ann. Section 28.944) which procedure was followed in the present case: a complaint by the then attorney general of Michigan and the then prosecuting attorney of Wayne County, sworn to before a notary public, was filed and an order granting a grand jury investigation was thereupon entered, followed by the taking of testimony in the grand jury chambers. Certainly this fully complied with the cited Section 1 of said 14th Amendment. As stated in *People* v. *Kert*, 304 Mich. 148 at 158:

> "The grand jury warrant took the place of an indictment, which under the Code of Criminal procedure,

3 Comp. Laws 1939, Sec. 17118 (Stat. Ann. Sec. 28.843), includes the words information, presentment, complaint, warrant and any other formal written accusation."

In *People* v. *Berry*, 107 Mich. 256, and *People* v. *Bennett*, 107 Mich. 430 at 432, it was held that a written complaint was unnecessary before issuance by magistrate of the warrant. Finally, it was held in *People* v. *Griswold*, 64 Mich. 723:

> "While an omission to secure an order from the prosecuting attorney before issuing process in criminal cases might subject the magistrate to censure, and, possibly in some cases to pecuniary injury and official embarrassment, it was never intended to deprive the court of jurisdiction in any case."

In *People* v. *Pichette*, 111 Mich. 461, the court said:

> "The proceedings before the justice are preliminary and law does not require that technical accuracy necessary in an indictment or information. The complaint in cases not cognizable by a justice of the peace need be little more than verbal information of a supposed wrong. This is followed by an examination under oath of the complainant and of other witnesses if deemed necessary, and the magistrate then issues his warrant."

—4—

4. The objection that the process was so vague and indefinite as to violate Section 19, Article II, and Section 1 of the 14th Amendment to the Federal Constitution is groundless, as appears by reference to the process itself, containing four explicit and extended counts.

—5—

5. Defendants' assertion that the process is neither a warrant nor indictment and is therefore in violation of

Section 1 of said 14th Amendment is refuted by examination of the process which in form and content is a warrant, being styled "In the name [225] of the People of the State of Michigan" as required by Section 22 of Article VII, Constitution of Michigan of 1908, and signed by Recorders Court Judge Gerald W. Groat "Acting under sections 17217 and 17218 of the Compiled Laws of the State of Michigan for the year 1929, and any additions and Amendments thereto, with seal of the Court affixed thereto, all in conformity with Section 13.541 Comp. Laws 1929 (Section 27.35 Stat. Ann.").

—6—

6. Contrary to Defendants' claim that the process is not properly styled in conformity to Section 22 of Art. VII of Constitution of Michigan for 1908, examination of the warrant's last paragraph shows it is styled in accordance with said Section 22, as follows:

> "THEREFORE in the name of the People of the State of Michigan, you and each of you are commended" etc.

—7—

7. Defendants' claim that the one-man grand jury law violates Section 1 and 2 of Article IV of the Michigan Constitution is unfounded. *People* v. *Hancock*, 326 Mich. 471.

—8—

8. Contrary to defendants' claim that the process does not set forth any crime cognizable under the laws of Michigan or under the common law, examination of said process shows that four distinct offenses are separately set forth, viz.: conspiracy to cheat and defraud, conspiracy to obtain property under false pretenses, gross fraud and cheat, obtaining property under false pretenses. (For further discussion relative to the allegations of each of these offenses see paragraph 25 hereinafter wherein is considered the information which follows the wording of the process.)

—9—

9. Defendants' objection that Judge Groat "had no authority . . . to proceed as a one-man grand jury because he failed to take the oath of a grand juror" as required by Sections 17218 and 17223 of the Compiled Laws of the State of Michigan for 1929 (Stat. Ann. Sections 28.944 and 28.949) is unfounded, for the reason that said Sections do not require any oath to be administered to the judge acting under said section. The provision " . . . in respect of communicating or divulging any statement made by such witness during the cause of such inquiry, the judge . . . shall be governed by the provisions of law relating to grand jurors" cannot be given a forced meaning. "Govern", according to Webster's International Dictionary, means "to regulate by authority", to "direct or control"; it should not be construed to mean that the oath prescribed in section 17223 of Comp. Laws of 1929 (Stat. Ann. Sec. 28.949) required of members of a panel of a 23-man grand jury be administered to a judge who has already taken the only oath of his office required by law. The oath contained in said Section 17223 is suitable only for members of the panel; it covers the whole proceedings [226] of such a jury and is not restricted to "communicating or divulging any statements" as is Section 17223, which should be considered as moreproperly referring t Section 17233, Comp. Laws 1929 (Stat. Ann. Section 28.959) which specifically controls the extent to which and conditions under which grand jury members may be required to disclose testimony given before them. See *Oakman* v. *Recorder of Detroit*, 207 Mich. 15.

—10—

10. No effort collaterally to attack the legal existence (or charter) of the Society of Good Neighbors, a Michigan non-profit corporation, as claimed by Defendants, is disclosed in the process. It specifically names defendants as the claimed offenders.

—11—

11. A review of the transcript of the preliminary examination establishes the existence of probable cause, contrary to defendants' claim.

12. The twenty-one reasons for the motion to dismiss filed December 29, 1948, at the close of the preliminary examination were all found unsubstantiated and the motion was denied by Recorders Court Judge Arthur E. Gordon on October 26, 1949, and the writer considers that Section 16291 of Comp. Laws of 1929 (Stat. Ann. Sec. 27.3552) which in part is as follows, as to Recorder's Court:

> "... No judge of said Court shall review or revise any order, judgment, sentence or act of any other judge of said Court, involving the personal discretion, judgment, or opinion of such other judge",

precludes this trial judge from reviewing Judge Gordon's decision on said motion to dismiss. However, so that nothing may appear to remain undecided, and solely for the purpose of this motion for a new trial the following holding is made as to each of the 21 subdivisions of said reason 11 in said motion for new trial (the Roman numerals refer to the corresponding reasons listed therein):

I, II. These reasons are similar to those stated in defendant's reason 1, discussed and held untenable in paragraphs 1 and 2 above.

III. This reason is similar to that asserted in defendant's reason No. 7 and is discussed and held untenable in paragraph 7 above.

IV. Defendants' claims that a judge of the Recorders Court has no right to act as a grand jury for the County of Wayne and that criminal cases can only be initiated upon indictments found by a jury of Wayne County or by the filing of an information by the prosecuting attorney thereof are untenable. Here the investigation was of alleged crime *in the City of Detroit* in which [227] a Recorder's Judge has jurisdiction (Comp. Laws 1929, Sec. 16300, Stat. Ann. Sec. 27.3561); a Recorder's Judge may act as a so-called one man grand juror (*In re Investigation of Recount*, 270 Mich. 328 at 330) and under the one-man grand jury statute (Comp. Laws 1929 Sec. 17217, Stat. Ann. Sec. 28.943 et

seq) the complaint "may be made by anyone and neither the prosecuting attorney of the County of Wayne nor the attorney general of the State of Michigan is a necessary party complainant." *In re Investigation of Recount*, supra, at 330. Nor is it necessary that criminal cases be initiated by a Wayne County jury or by the filing of an information by the prosecuting attorney. The warrant of the judge acting as a so-called one-man grand juror is sufficient. *People* v. *Kerr*, 304 Mich. 148 at 158.

V. This claim is discussed and held unfounded in paragraph 8 above.

VI. This claim is discussed and held unfounded in paragraph 9 above.

VII. This claim is untenable because the one-man grand juror's warrant is sufficient, *People* v. *Kert*, 304 Mich. 148 at 158.

VIII. This claim is discussed and held unfounded in paragraph 4 above.

IX. The claim that the process is so general, vague and indefinite in its terms as to make it impossible for the defendants to prepare for the examination is refuted by an inspection of the allegations of the process and by the fact that the preliminary examination before Judge George Murphy by Recorder's Court consumed some 54 days during which, as appears from the transcript, the defendants had ample opportunity, had such been needed, to explore all possible claims of the prosecution.

X. The claim that the process is an attempt to collaterally attack the legal existence of the aforesaid Society of Good Neighbors is discussed in paragraph 10 hereinabove, and found untenable.

XI. The claim that the process is neither a warrant nor an indictment is disposed of in paragraph 5 above.

XII. The claim that the process is not entitled, etc., is disposed of in paragraph 6 above.

XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI. These nine asserted reasons are wholly unfounded in the

transcript of the examination or in the testimony on the trial.

—13—

13. The defendants' claim that the court erred in denying defendants' motion to dismiss filed May 12, 1949, is unfounded. This motion was denied by Recorder's Judge Arthur E. Gordon which ruling cannot be reviewed by this court under the above [228] cited Section 16291 of Comp. Laws of 1929 (Stat. Ann. Sec. 27.3552). However for the purposes of this motion for new trial and that nothing may remain undecided herein the court will consider each reason set up in said motion to dismiss. (The paragraph numbers follow those of the said motion to dismiss as included in reason No. 13 of the motion for new trial):

I(a). Defendants' objection to the use of the subpoena duces tecum by the so-called one-man grand juror is unfounded. The books, records and papers were properly brought before the one-man grand juror by such subpoena which was the only authorized means of accomplishing the result. *Comp. Laws 1929 Sec. 17217, Stat. Ann. Sec. 28.943.* Furthermore the testimony of Jacob Friedman of the Michigan Unemployment Commission and Lieutenant Nowlin of the Detroit Police Department is convincing that Morrison T. Wade consented to the records being taken in the beginning. Finally Morrison T. Wade was cited for contempt by the one-man grand juror for refusal to bring in certain books, was fined $100.00 for the contempt and the fine was sustained by the Michigan Supreme Court which refused leave to appeal from the order therefor. The retention of said books, record and papers by the prosecuting attorney was merely the retention in his control of the evidence necessary on the trial of the cause. The defendants, during the 105 days of trial extending over a period of seven and one-half months, were accorded every opportunity to examine the papers, and *all of them*, during *every* hour the court was in session. In addition to this continuous and complete availability of all records for use by de-

fendants during court hours, the court repeatedly made arrangements for the defendants and their counsel—whenever they so requested—to have the privilege of having all files and records (there were 13 four-drawer letter files, numerous paper filled cartons, ledgers, check book stubs and miscellaneous papers) hand trucked into the court room from the nearby storage room on Mondays or other days on which the trial was not in progress, and at hours convenient to defendants, their auditor and attorneys, so that defendants might have access to all records and the necessary tables and chairs for convenient inspection of, and copying from, said records. Furthermore, owing to the illness of defendant Bessie Lou Wade the trial was adjourned from March 6th to March 20th during which period added periods were requested by, and granted to, defendants' counsel for examination of the records. Every day all the records were present in court, open for use by defendants and their attorneys. Attorney Sloman for many days, hours at a time, *in the presence of the court and jury* worked in the files. Such was true, but for a shorter period, as to the witness Oliver Fluke, the defendants' auditor. The trial opened January 23, 1951, the people rested July 11, 1951, the defendant commenced its testimony July 17, 1951. Thus all the records were available to the defendants, their attorneys and auditors for over four months before the prosecution rested. During the cross examination of the people's witnesses every paper, check, check stub, ledger [229] sheet was presented to defendants' counsel literally within a few moments of the time said counsel made request therefor with the exception of one unimportant document concerning the prior existence of which the defense testimony was very weak, and the police officers denied ever having seen it. The defense had more than ample opportunity afforded for the preparation of its case as far as the access to records and papers was involved.

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14. Defendants' claim of error based on the denial by Judge Gordon of defendants' Supplemental Motion to dismiss and to suppress the evidence and quash the information is unfounded. [230] Although this trial judge is precluded from reviewing said denial (Sec. 16291 of Comp. Laws of 1929, Stat. Ann. Sec. 28.3552) the court, solely for the purpose of this motion for a new trial and to preclude any matter remaining undecided herein, specifically considers each subdivision of said Reason No. 14:

I. Contrary to the claim of defendants, the record is clear that the books and records of the Society of Good Neighbors were lawfully subpoenaed before the one-man grand jury under *subpoena duces tecum* without any illegal search or seizure.

II. Contrary to defendants' claim the retention of the records of the Society of Good Neighbors by the prosecuting attorney was a lawful control of exhibits to be used in evidence on the trial and the motion to dismiss and suppress the evidence was properly denied.

III. The prosecuting attorney's refusal to accede to demand by Society of Good Neighbors for the return of the books and record is no valid ground for dismissal, especially inasmuch as the retention of said records for use as evidence on the trial was proper and necessary.

• • • • • • • • • •

[233] 22. There is no merit in defendants' claim of error to the effect that defendants were not permitted free access to the books and records of the Society of Good Neighbors during the trial as set forth in paragraph 13 I(a) hereinbefore, the said books and records were the principal evidence of the people, and absolutely necessary to a proper presentation of the people's case. Therefore, it was proper that said books and records be kept under the supervision of the officers. Defendants, their attorneys and their auditor, had free access to said books and records during court hours during the entire trial and repeated days when there was no court were set aside for defendants, their attorneys

and auditor to have the use of the court room, where all the file cabinets and boxes of records and books were hand-trucked by the officers so that the defendants might have the opportunity to examine and copy any record or document they saw fit. *At no time* during the entire trial was either defendant, their attorneys or auditor denied access to any document, any book, any record or any drawer or box in which any record was stored. For further discussion of this matter see said paragraph 13 I(a) hereinbefore.

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[237] —26—

26. The defendants claim error in the denial of the Motion for a directed verdict.

I. This claim of error is untenable for the reason there was sufficient evidence from which the jury could find the existence of a conspiracy as alleged in the first count of the information. There was testimony [238] that the two defendants without exception controlled the corporate set-up of the Society of Good Neighbors, that a retroactive salary increase and expense account were voted to Morrison T. Wade when only three members of the board of directors were present, two of whom were Mr. and Mrs. Wade, that the Society's bank account was under the exclusive control of Mr. and Mrs. Wade, that the books of the Society were kept in accordance with Mr. Wade's orders; that Morrison T. Wade throughout the trial claimed the Society owed him money for back salary and funds advanced during the same year that the Society's own books listed his account as overdrawn. For instance, Exhibit 112A which is a Society of Good Neighbors check, #12783, drawn on the National Bank of Detroit, dated February 6, 1945, for $500.00, payable to order of Morrison T. Wade, was endorsed by Wade and by E. C. Dittrich & Co., Inc. The check stub #12783, from Exhibit 97, shows "Order of Morrison T. Wade" "For Cont. pro". Page 7 of Exhibit 75-A (Society's check register) shows check #12783 posted under "Cont. pro." "charge to Morrison T. Wade". Page 11 of Exhibit 75-A shows total for "Cont. pro." for February 1945 to be $523.00. Page 280 of Ex-

hibit 71, the Society's ledger, shows the total of $523.00 posted under "Contribution promotion" as brought forward from the C R (check register—Exhibit 75-A). There was testimony that this $500.00 check was applied by E. C. Dittrich & Co., Inc., upon the account of Morrison T. Wade for a mink coat for Mrs. Wade. Thus the $500.00 item shown on the Society's books as charged to "Contribution Promotion" was actually used for Mrs. Wade's mink coat. This "contribution promotion" account in the Society's ledger was shown in the testimony to have been used for other items of a similar nature. Again check #12811, Exhibit 112-B in the amount of $510.00, dated February 10, 1945, was drawn on the same bank as #12783, and like the latter, was payable to order of Morrison T. Wade and endorsed by him and E. C. Dittrich & Co., Inc. The check stub of #12811 showed "for $400.00 loan to S. G. N., $110.00 Emp. Wel. (Gifts for Sns)".

"Emp. Wel." was shown to refer to Employees' Welfare. The Check Register, page 8 of Exhibit 75-A for February 1945 shows $110.00 "charge to Morrison T. Wade 'E.W.'" (Employees' Welfare) and $400.00 placed in column headed "Dr. M.T.W." The jury could well have been impressed that this check eventually used to apply to the account for furs for Mrs. Wade, at E. C. Dittrich & Co., Inc., was not a true *employees' welfare* item. Furthermore, this check #12811 was included in the column total of $2127.45 headed "M.T.W." on page 11 of Exhibit 75-A (check register) and said $2127.45 is posted in the Morrison T. Wade debit column on page 121 of the ledger, Exhibit 71, the balance column for February 1945 being $182.02, *and in the red.* Another check #12497 (Exhibit 112F) for $275.00 dated December 14, 1944, payable to Morrison T. Wade and endorsed by him and E. C. Dittrich & Co., Inc., according to the check stub, was "for [239] cont. pro.—envelopes & post" and was charged to postage in the ledger, but actually credited to the account for furs. All of these checks were signed on behalf of the Society by Mr. Wade personally, indicating his personal knowledge thereof. When it is considered that, according to the testimony of Jack Friedman, from Exhibit BB-4, the 1945 drawings of

the two defendants totaled $13,200.70, the "contribution promotion" account at times, at least, appears to have been a convenient cover for checks drawn for the personal use of one or both of the defendants.

II. This claim is untenable for the reason that the prosecution adduced testimony from which the jury could have found each item therein established. There was an accumulation of credible testimony to the effect that (1) there were repeated representations by the Wades, and especially by Morrison T. Wade, that the entire efforts of the Society of Good Neighbors were expended charitably in the interest of the needy of the City of Detroit; (2) that on certain dates, for instance, calls were made by radio and otherwise for specific items, such as a stove, a dresser, a refrigerator for a certain needy person, or family, when the records of the Society showed that on that date and on dates immediately before and after said date a number of the same items were being sold through the Society store; that, for instance, refrigerators for the needy were called for at the same time that nearly a box car load of stoves and refrigerators were being sold to a second-hand dealer; that second-hand dealers met the trucks sent out to collect the merchandise donated, and made purchases from the trucks or before the donated articles were made available to the needy; that according to one witness she responded to a radio call by Mr. Wade for a certain type of dress for a certain needy person, gave her own dress to the Society's truck driver sent to pick it up, and later found said dress up for sale in the Society store; that the *Wades had no personal bank account* but used the Society's checking account indiscriminately for their own business transactions. There was also testimony; that the gross receipts from bingo games were never entered in the records or accounts or the sums of money in the bag (taken from the Moose Hall where the bingo was played) after numerous expense items were admittedly paid, such as the floor workers and the musicians; that one witness testified hearing Wade say the night before they had taken in $13,000.00, although never was any comparable amount shown in the books; that the witness, George Alder, Wade's assistant, admitted

writing a letter to the Office of Price Administration stating that the crowds playing bingo averaged 1000 nightly; that the only accounting of the total receipts shown on the trial or even hinted at by any witness as being in existence other than the ledger showing which was not of the total gross receipts, was a paper, Exhibit 206-A, in handwriting of witness [240] O'Toole, which was a statement of bingo receipts and expenses given O'Toole from the Society's books for part of the period of nights on which the bingo was run by the Northwest War Council but under Wade's direction (after the Detroit Police had compelled the Society to give up two of the three nights per week of bingo play, the Northwest War Council taking one night and the Redford War Memorial taking the other), showed that the gross income from said bingo was $32,135.55 of which the Northwest War Council received only $917.55; that witness O'Toole testified he checked the books and records of the Society to obtain the figures contained in said Exhibit 206-A. Witness George Alder testified that the gross income of the pantry, operated by the Society under Wade's direction, at the bingo games totaled from $50.00 to $200.00 per night.

There was extensive testimony to the effect that the two defendants worked together in the enterprise, that both were on the board of directors of the Society, that expense allowances and retroactive increase in salary were allowed *pro forma* by the said board when the two defendants were two of the three directors present at the meetings, that the defendants participated with others, named as co-conspirators such as Ann Bruening and Edith Brown, in selling the merchandise gathered from donors, directly from the trucks. A *prima facie* case of conspiracy both under counts one and two was shown.

III and IV. These claims are untenable. There was not only a showing of conspiracy but the acts of the defendants themselves were sufficient to establish a *prima facie* case under each of counts three and four.

V. This claim is untenable because there was testimony tending to show that defendants used the skeleton or frame-

work of the Society of Good Neighbors as a "front" or instrument to effect their fraudulent purposes.

VI. This claim is untenable. There were many items of testimony tending to show false representations such as radio appeals by Morrison T. Wade, that certain items as refrigerators, dresses, bureaus were necessary for specific cases, and such was not the truth—for instance, stoves and refrigerators were called for by people, which stoves and refrigerators actually were intended to be sold to second-hand or junk dealers and not merely as surplus after charity cases were supplied.

VII. This claim is untenable. For discussion see immediately preceding paragraphs of this Reason No. 26.

VIII. This claim is groundless. Such was not the theory of the prosecution.

IX. This claim is groundless. Its statement is of such a general nature, without support in the record, seen by reference to the testimony of Jacob Friedman.

[241] X, XI. These claims of error are untenable and no ground for a new trial or a directed verdict.

XII. This claim of error is too general to be seriously considered. The prosecution called 90 witnesses including most of the employees of the Society of Good Neighbors employed during the period covered by the information. For further discussion of this point see paragraph No. 23 hereinbefore.

XIII. This claim is untenable. What the defense really seeks is that the prosecution be bound by the defendants' *interpretation* of the books and records of the Society. For instance, the ledger account entitled "contributions promotion" was such as to be subjected to explanation. For instance, at one time a $1092 loaned to M. T. Wade was transferred to the contribution-promotion account, and the ledger entries of the building fund of $500.00 at one time and a $1000.00 at another were subject to interpretation especially when there was no testimony showing the continued

actual existence of such a fund. The foregoing references to testimony are merely illustrative.

XIV. This claim is untenable. For further discussion see preceding sub-paragraphs of this paragraph No. 26.

XV. This claim is untenable. For further discussion see paragraph No. 23 hereinbefore.

XVI. This claim is untenable. There was abundant testimony from which the jury could find that Morrison T. Wade's account with the Society was overdrawn and no back salary owed him on numerous occasions when Society checks were used by him to pay his personal expenses. For further discussion see sub-paragraphs I and II of this paragraph 26. Furthermore, according to Oliver Fluke, the Society's auditor who was relied upon by defendants during the trial, Wade withdrew around $44,000.00 from the Society of Good Neighbors in 1946, and he also testified Wade loaned the Society $22,000.00 that same year; also that on May 30, 1946, Wade's overdraft was $9477.14 while on June 30, 1946, the books showed an item of $4620.00 *to* the Society from Wade which Fluke claimed was a loan to the *Society* (see Fluke's testimony). Fluke also testified Wade's overdraft as shown in the ledger on June 30, 1946, was $7499.80 and that in the ledger in *Fluke's own handwriting* Wade's overdraft at the close of 1946 was $8681.34; and further that the books showed a loan from the Society to Wade of $3000.00 at one time. Fluke further testified that just looking at 1946 balance sheet of the Society one could not get a correct idea of its financial condition. Again the foregoing items are merely illustrative of and only a very small part of very extended testimony to the same effect.

XVII. This claim is untenable. Under date of January 13, [242] 1943, defendant, M. T. Wade, wrote a confidential letter to the Society's bookkeeper, Herman Gluer (Exhibit 81-B), in which Wade directed the opening of the "contribution-promotion" expense account. Thus this very unusual account which contained so many personal expense items of the Wades was ordered opened by Mr. Wade him-

self. These and allied items went to the question of fraudulently made entries in the books.

XVIII. This claim is groundless especially in the light of Exhibit 81-B, a letter by Morrison T. Wade to the bookkeeper, Herman Gluer, directing him to open the "contribution-promotion" expense account. The honesty of the defendants certainly was put in question by a multitude of items of testimony.

XIX. This claim is untenable. For further discussion see foregoing sub-paragraphs of this paragraph No. 26.

XX. This claim of error is absolutely contrary to the testimony of every witness who had anything to do with the books. See sub-paragraphs XVII and XVIII of this paragraph 26 hereinabove. Everyone having anything to do with the bookkeeping indicated: (1) on any questions of entries Mr. Wade's word was final; (2) that the bingo expenses were set by Mr. Wade; (3) that Mrs. Wade herself worked on the books for at least some months; (4) that most checks were signed either by Mr. or Mrs. Wade; (5) that Mr. Wade was the bingo manager, who received the bingo worksheets from witness Edith Brown.

XXI. This claim of error is untenable. In any event the mingling of the Society's funds with those of "any other organization" of itself was not such an issue as would entitle defendants either to a directed verdict or a new trial. However there was testimony from which the jury could have found:

(1) That the Society funds were used to pay bills of other Wade controlled corporations;

(2) That loans or advances to and from the Society's accounts from and to these other Wade controlled corporations was such that an almost hopeless confusion of funds resulted;

(3) That the Society's trucks and Society paid employees were furnished the one or more other Wade controlled enterprises (in such a way that the jury could have found such to be an improper expenditure

of Society funds or use of Society property). Again these are merely illustrative instances.

XXII. This claim is untenable. That Mrs. Wade acted as posting clerk under the direction of Ed Brannan, the Society Auditor, is no ground for a directed verdict or [243] a new trial. However, Mrs. Wade was a director of the Society, that for a considerable time she was its Vice-President and prepared to take over its management in the event Mr. Wade were drafted into the Armed Services, and she admitted receiving a mink coat, a sable scarf. She also testified (July 31, 1951, afternoon) that she wrongly charged a Society's check dated March 30, 1946, payable to Sachs Fifth Avenue Store (Exhibit 122-A) to have been charged to Mr. Wade's account.

XXIII. This claim of error is untenable. The most that could be claimed for Brannan's testimony was that it went to the question of fact as to the use of the funds.

XXIV. This claim is untenable. See foregoing discussion in sub-paragraphs I and II of this paragraph No. 26, hereinbefore.

XXV, XXVI. These claims are untenable and need no further discussion.

XXVII. This claim is untenable for the reason that the testimony of Brannan, Gluer at most contributed to a question of fact which was a jury question.

XXVIII. This claim is untenable. As an instance of the way the defendants received something of value from the public the testimony showed that (1) Mr. Wade made direct appeals over the radio for certain specific items for certain cases, (2) that people contributed such items of merchandise for such items of assigned use, (3) that the identical items were sold and not used for the specific purpose, (4) that the proceeds from the sale went into the Society bank account which was the bank account shown to be used by Wade for his personal and family expenses.

XXIX. This claim is untenable. No further discussion is necessary.

XXX. This ground is untenable and, being an "omnibus" claim, is discussed in the preceding and succeeding paragraphs of this opinion.

—27—

27. Defendants claim error because of a statement by the court *in the absence of the jury* as a part of the decision on the motion for a directed verdict. The statement is completely supported by the testimony and record at that time, which was the close of the people's case. It was still a correct statement at the close of defendants' proofs. There is abundant testimony from which the conclusion may be properly drawn that these two defendants were in fact the Society of Good Neighbors, that they used the articles collected and the proceeds from the sale [244] thereof as they saw fit; that they did donate articles to welfare and worthy cases but that they retained for their own purposes such as the establishment and operation of the various Wade enterprises (such as Holiday House, Inc., a flower and gift shop; Recreation, Inc., which had concessions at Dodge Park; and Chase-Wade Corporation which was an attempt to set up a speed boat enterprise), a large share of the money and proceeds which was far in excess of any proper operational expense, and that all of this was done in furtherance of a deliberate plan to obtain for their own selves money and property from the citizens of Detroit by representing that the whole enterprise was entirely charitable. The appeal made for gas stoves for needy cases which appeal actually was made to fill the box-car of stoves sold to witness Jacoby is but one example in a great many of the methods used to defraud the givers who were not responding by giving their stoves in order to increase the amount of cash in the Society's bank account which was being kept low by withdrawals for a $100.00 hat for Morrison T. Wade or a mink coat for Mrs. Wade.

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[246] —38—

38. The defendants' claim that the court erred in failing to make an investigation of jury tampering is contrary to

fact. The court did make such an investigation and called in the attorneys and the two defendants, and, after a discussion, the court indicated that "if Mr. Davidow and Mr. Sloman felt that they should have a mistrial, that the court was willing to grant it." Mrs. Wade said, ". . . we do not want a mistrial in any way," and the court later said, "I am perhaps too liberal in saying 'I will grant a mistrial', because as far as I am concerned there must never be anything appearing" and Mrs. Wade interrupted the court to say, "We don't want it, Your Honor," and the following then took place:

> "The Court: —in actuality or by mere aroma of appearance to have anything that anywhere broaches, not alone tampering with the jury, but any unusual situation with regard to the jury, so that is why I have said and I will repeat it still, if there is any feeling on the part of either of you people or your counsel you should have a mistrial, I certainly would grant it because I don't feel that there has been anything done, that, so far as *I found from the investigation* and your attorneys have heard every word that either juror has said to me—
>
> "Mr. Wade: I filed a motion of prejudice. We have been through three years of this. We knew what to anticipate and do before this came to trial. I don't care how many jurors are approached. Our position we feel is so secure that no juror can be prejudiced, and I don't care what it comes to.
>
> "Mrs. Wade: Can there be an investigation on this, can this be followed through?
>
> "The Court: I shall do that. Of course, we have the business of the Court. Not only shall I but I am doing it and I, after suggestion of your counsel, I do not want at the time being to stop the wheels of the judicial procedure here because after all that is the same as a mistrial.
>
> "Mr. Davidow: We want the case to go on just as it is."

Mr. Bolio, the assistant prosecutor, then stated that the prosecution would "not oppose" a mistrial after which Mr. Davidow stated:

> "I want to say this on behalf of these defendants; I stated not in their presence before *we are anxious to avoid a mistrial.* We want this case brought to a conclusion and have it ended, and we shall cooperate with the Court to the limit to bring about that result."

As stated by the court on the hearing on the Motion for a new trial, the court did investigate and "found that there was nothing as far as the court can see or ascertain that happened with any juror; no report came to the court of any such happening at least subsequent to February 3 and there was nothing further to be done with respect to it."

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[252] SUPPLEMENTAL MOTION

Hereinafter the court considers the reasons and grounds for new trial set forth in Defendants' Supplemental Motion therefor.

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[253] 3—Supplemental

3. Defendants claim that a juror, Isabel Eschelman, falsely represented to the court on the voir dire that (1) she did not know one of the witnesses, Walter E. Kutch. The following took place on the voir dire after the prospective jurors had had an opportunity to examine the list of endorsed witnesses for the prosecution among which the name of Walter E. Kutch appeared.

> "The Court: Do any of you seated in the box know any of the persons on that list? Number 10 raises her hand. Whom do you know?
>
> "Mrs. Eschelman: The Reverend Kutch lived on our street.
>
> "The Court: I couldn't hear you.
>
> "Mrs. Eshelman: The Reverend Walter Kutch. I live on Whitcomb. He was a minister at the church at the corner.

"The Court: Did you say Walter Kutch?
"Mrs. Eshelman: Yes.
"The Court: You know Walter K-u-t-c-h?
"Mrs. Eshelman: I don't know him but I know he was a minister there.
"The Court: He was a minister who lived near you?
"Mrs. Eshelman: On that street.
"The Court: On that street?
"Mrs. Eshelman: Yes.
"The Court: Were you acquainted with him at all?
"Mrs. Eshelman: No, never went to his church, not once.
"The Court: Had you ever met him in a social or informal way?
"Mrs. Eshelman: No, just passing on the street?
"The Court: You have passed him on the street?
"Mrs. Eshelman: I have passed him on the street as a neighbor.
"The Court: As a neighbor; and would your acquaintanceship with Walter Kutch in any way influence your deliberations if you are seated as a juror in this case?
"Mrs. Eshelman: Absolutely not."

[254] From the foregoing there was certainly a showing made by Mrs. Eshelman that (1) Kutch was a neighbor, (2) Kutch was a minister of the church on the corner, (3) she had known him as a neighbor she had passed on the street. The court recalls that Walter Kutch was closely associated with the defendants during the entire trial as appeared by his numerous visits to the court room and conversations with defendants and their counsel in the presence of the court. Inasmuch as counsel had had the jury list previous to trial and the full opportunity had been afforded counsel to study the names on said list, counsel certainly was not precluded from requesting the court to go more fully into Mrs. Eshelman's acquaintance with Mr. Kutch. Defendants have filed an affidavit of Mr. Kutch stating he had known Mrs. Eshelman for approximately

twenty-five years, that he rented a garage from her and her husband twenty-five years ago, and that her husband during the year 1950 asked Kutch for a job on two occasions. Not one item in said affidavit of Walter Kutch is inconsistent with Mrs. Eshelman's answers on voir dire examination. She is not shown to have made a false representation as to the witness Kutch.

Furthermore, Walter Kutch testified on February 1, 1951, which was the third day of the taking of testimony. His close association with defendants, it would seem, would or should have prompted his calling their attention to the fact that Mrs. Eshelman was known to him if his knowledge of her led him to believe she was or would be ——?—— to the defense. Apparently, the defense, having known that Mrs. Eshelman was an acquaintance of Kutch, as a result of her answers on voir dire examination, were willing to take their chances on her being *favorable* to the defense and, therefore, requested no further interrogation of her and were content to let her remain on the jury.

Te defendants also claim that the juror, Mrs. Isabel Eshelman, falsely represented to the court on voir dire examination that (2) "She was not familiar or acquainted with any member of the metropolitan police department of the City of Detroit. In support of this claim defendants filed a purported affidavit of Kathleen S. Frede, the oath to which was administered by Edmund S. Sloman, as notary public, who, at the date of the administering of the oath, January 12, 1952, was an attorney of record in the case as of counsel for defendant, Bessie Lou Tanner Wade. (As such attorney, Mr. Sloman actively participated in the hearing on the Motion for new trial.) This was in violation of Comp. Laws, 1948, Section 60177, Stat. Ann. Section 27.97, which is as follows:

> "It shall not be lawful for notaries public who are attorneys and counselors to administer oaths in causes in which they may be professionally engaged."

Under the circumstances the court cannot consider said purported affidavit of Kathleen Frede. The court has neither found nor been cited a Michigan case exactly in point.

Several Michigan cases hold that the attorney was not disqualified, under the above quoted statute, to administer the oath to an affiant because *at the time* of swearing the affiant the attorney was not the [255] attorney, or the attorney of record, in the cause. *Sullivan* v. *Hall*, 86 Mich. 7; *Allen* v. *City of West Bay City*, 140 Mich. 111; *Thomas E. Lynch & Co.* v. *Wayne Circuit Judge*, 125 Mich. 110; *Rose* v. *Asam*, 240 Mich. 151. In *Thomas E. Lynch & Co.* v. *Wayne Circuit Judge* the court seems to indicate that had the attorney before whom the affidavit for transcript of Justice's court judgment was sworn been an attorney in the cause *at the time* of the taking the affiant's oath, the writ of mandamus would have issued to strike the affidavit from the files.

The courts of other states, *even in the absence of statute* frown upon the practice of a lawyer taking oaths to affidavits, to be used in the cause in which he is an attorney:

Maples v. *State*, 131 S. W. 567 (Tex. Cr. App.);
Savage v. *Parker*, 43 So. 507 (Fla.);
Maroosis v. *Catalana*, 152 N.W. 559 (Neb.);
Crawford v. *Ferguson*, 115 Pac. 278 (Okla.);
City of Chicago v. *Simonetti*, 203 Ill. App. 279 (Ill.);
Den ex dem. Hadley v. *Geiger*, 9 N. J. Law 225 (N. J.);
City Commission of City of Gallipolis v. *State*, 173 N.E. 36 (Ohio).

However, at least one court appears to take a contrary view. See *Hulston* v. *Preferred Accident Insurance Co.*, 143 N. W. 566 (Iowa). In *Crawford* v. *Ferguson*, 115 Pac. 278, 45 L. R. A. (N. S.) 519, the Oklahoma Court said:

> "It is a significant fact that twenty-three of these affidavits were acknowledged before the attorney for the petitioner. As this matter has not been passed upon by this court before, we will not do more now than say that the authorities all denounce this practice. If it is permitted, the door is opened to all kinds of impositions and frauds. Such conduct must not be repeated. In the future *such affidavits will not be received or considered*, except as the basis of proceedings against the offending attorney." (Emphasis is writer's.)

In the *Maples case, supra,* the court held (P. 568):

> "Under our statute the court may decide a motion for a new trial or contested issues by means of affidavits or by hearing testimony, of course, the affidavits mentioned in the Statute means such as can be legally taken. An affidavit taken by a party not authorized to administer oaths in the particular transaction would not constitute a legal affidavit, and therefore, not the basis of testimony on objection."

To the effect that affidavits sworn to before attorneys in the cause should be stricken, are the following:

Maroosis v. *Catalano,* 152 N.W. 559 (Neb.)
Maples v. *State,* 131 S.W. 567 (Tex. Cr. App.)
Williams v. *State,* 144 S.W. 623 (Tex. Cr. App.)

[256] It was held in the *Maroosis case,* supra, that under the Nebraska Code "a Notary public who is also an attorney of record in the case is not a proper party before whom affidavits of this kind may be taken, and the affidavit of Maggi *ought to have been stricken from the files.*" (Emphasis is writer's)

The Texas Criminal Court of Appeals has repeatedly held that affidavits taken by the attorney for the accused are not to be considered on a motion for a new trial. *Lamb* v. *State,* 108 S.W. (2d) 1112; *Sanchez* v. *State,* 15 S.W. (2d) 632; *Maples* v. *State,* supra; *Williams* v. *State,* supra. The *Lamb case,* supra (108 S.W. (2d) 1112 at 1114 is especially in point in the case at bar, as appears from the following statement of the Texas Court:

> "Appellant made a motion for new trial, based in part upon alleged misconduct of the jury. He appended to his motion the affidavits of two of the trial jurors. The affidavits were taken before appellant's attorney as a notary public, and, under all the authorities, cannot be considered."

In view of the express terms of the above quoted Michigan Statute and the generally accepted view of the American

Courts, the affidavit of Kathleen Frede, sworn to before Attorney Sloman, an attorney of counsel for a defendant in this cause, cannot be and is not considered by the court.

4a—Supplemental

4a. The defendants' claim that the court erred in asking the following question of the jury on *voir dire:*

> "Would any acquaintanceship that you have in the police department in any way cause you to be embarrassed by reason of any defense that the defendants might make? If so, raise your hand if you feel at all embarrassed to set on a jury under those circumstances. No hands raised."

is wholly untenable for the reason that this question was asked immediately *after* and pursuant to the following statement and request of defense counsel (page 56 of transcript of proceedings of January 26, 1951):

> "Mr. Davidow: Well in view of one of the matters of the defense which will be the conspiracy on the part of officials of the police department to do harm and injury and frame the defendants, whether the knowledge or acquaintanceship with these police officers or officials would in any way be embarrassing to them by reason of the charge we make against their behavior."

[257] Having requested such a question and not having taken any exception to the question as asked by the court and not having suggested any change or variation therein, defendants' counsel cannot now be heard to complain. The court submits that the question as asked fairly contains the substance of counsel's request.

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[259] 10—Supplemental

10. This claim of error based on the asserted refusal of the court to "ask the prospective jurors whether they had heard any discussion of (sic) expression on the alleged

guilt of defendants and whether as a result of same they had formed any opinion in the case", apparently refers to what took place in chambers when Mr. Davidow reported he had information that Jack Friedman, one of the People's witnesses, had been seen talking to one of the jurors on the panel in the courtroom (transcript pages 130, 131, 132, January 26, 1951). Mr. Davidow requested the court to ask all the jurors:

> "Whether they have heard this discussion, or whether as a result of such discussion they have formed any opinion one way or the other in this case."

The court suggested that Mr. Davidow's informant be called in and interrogated under oath. Mr. Davidow then stated to the court, "I think Mr. Jack Friedman should be called in and asked about it", and then the following took place (page 131 transcript of January 26, 1951):

> "The Court: If you call the person who reported it first, then I will have that. I will put him under oath and I will know what is being done.

[260] Mr. Davidow: I am in no position to do that now, Your Honor.

The Court: There is nothing further to do.

Mr. Davidow: It was given to me under circumstances I consider absolutely reliable.

The Court: That may be but now, Mr. Davidow, there is no use of our having any question on this record. I haven't any question about your integrity and I am, I have not certainly raised it, but you know as well as I do that the court has to proceed in the way on the basis of testimony. Now, something has been reported to you. I have a right, if I am to act upon hearsay, to go to the bottom of hearsay first and determine what I am going to do about it. Now, either we won't have anything further said about it or let's have the people in. I am willing to investigate the whole matter but I am going to do it with people under oath.

Mr. Davidow: I am in no position to give you that information now."

From the foregoing it is evident that defendants' counsel requested the court ask the jurors a question which presupposed that a discussion had taken place between witness Friedman and a juror in the presence of other jurors. The court obviously sought to determine first whether such a discussion *had* taken place, especially since Mr. Davidow did not claim to have seen or heard it. It was then proper for the court to insist that Mr. Davidow's informant be brought before the court so that the court could first determine (before interrogating the jury) whether such a discussion actually had taken place. Certainly, if it developed that no discussion had taken place it would have been improper for the court to have interrogated the jury concerning a non-existent discussion. Since Mr. Davidow was unwilling to reveal the source of his claimed information the court did not abuse his discretion in refusing to proceed further in the matter.

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[262] 18—Supplemental

18. This objection concerning testimony of purchase of furs by defendant, Morrison T. Wade for his wife, the other defendant, is referred to in paragraph 36 of the original motion and discussed in paragraph 36 (original) hereinbefore. The present objection contains misstatements, such as "that it stands uncontradicted and unchallenged in the trial, whatever moneys Morrison T. Wade withdrew through checks issued by the Society of Good Neighbors, were charged to his account as salary . . . that he had sufficient sums due him to offset any checks so issued for him". On the contrary the prosecution contended, and there was testimony tending to show that checks were issued for Wade's personal use which were *not* charged to his salary account but were charged to "contribution and promotion" and so indicated in at least two of the Society's income tax returns. Furthermore, there was a sharp issue of fact as to defendants' claim Wade had sufficient sums due him to

offset any checks so issued to him or for his personal expenses. There was abundant testimony to the effect that for more than one year Wade was charged with an overdraft on the Society's books at the same time that these Society checks were being drawn to pay for his personal expenses such as for furs bought from E. C. Dittrich & Co. for his wife, a $100.00 hat bought from Capper and Capper, personal telephone bills, expenses of Chase-Wade Corporation, etc. The Society's federal income tax return for 1944 (Exhibit 155B) showed under the heading "other operating, Administrative, and overhead expenses" an item of "contribution promotion—$9,346.68" which consisted principally of checks for the Wade's personal expenses. If this were money properly due Wade for salary it should have been so indicated in the return. A like situation existed in the 1946 return of the Society (Exhibit 155) where the "contribution promotion" item was $9,125.12. If this were properly chargeable to salary to Wade it should have been so listed. The jury could properly have found this to have been a wilful concealment by defendant, Morrison T. Wade.

Check for $101.12 to the Detroit Auto Club Travel Bureau (Exhibit 92AQ) was charged to "cont & Pro", i. e. "contribution and promotion." A check (Exhibit 122-A) dated March 30, 1946 to Saks Fifth Avenue for $575.89 was likewise charged to "contribution and promotion". There was also testimony that the Society's check (Exhibit 128-A) dated April 25, 1946 in sum of $249.96 payable to Capper & Capper, a men's furnishing store, and a check for $471.60 (Exhibit 107-X) and one for $72.06 (Exhibit 99) were applied on M. T. Wade's account at Capper & Capper which covered such items as 24 week-end brushes, the price of which was $300.00, and a $100.00 hat, all of which items Mr. Wade testified to having purchased.

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[263] 22—Supplemental

22. The claim that the court erred in permitting testimony concerning bingo is untenable. The testimony showed that the bingo games were run at the Moose

Temple in the name of the Society during one period as often as three nights per week, that no account was kept of the *gross* receipts thereof; that Morrison T. Wade had charge of the black bag in which the nightly bingo moneys were placed after payments were made to bingo helpers, floorworkers, etc. of which said payments no ledger or other bookkeeping entries were made; that a sandwich bar or pantry was operated in the Society's name at the Moose Temple on bingo nights; that, according to the letter from George Alder, assistant to Morrison T. Wade, to the Office of Price Administration, relative to the food needs of the pantry, as high as one thousand persons per night attended the games; that, according to the testimony of Charles Fabian, he heard Wade say the next morning after a game that the "take" tne night before had been $13,000; that a financial statement furnished the Detroit Police Department of the bingo transactions for the one period the receipts were $32,135.55 of which it was claimed only $917.55 was profit; that, in spite of the fact of this one rather detailed statement of the bingo games for this period *which actually showed gross* receipts there were no where in the ledgers or books of the Society any entries either of these gross receipts or any other gross receipts from bingo. The foregoing items of testimony by no means are all inclusive but are sufficient to indicate that the testimony concerning the bingo games was relative, material, and competent as far as a consideration of the Society's books, Wade's connection therewith, especially as reflecting that Wade and his wife, through the use of the Society name and organization were engaging in enterprises the funds of which were only partially accounted for in the Society books which were controlled entirely by the Wades.

* * * * * * * * * *

[264] 27—Supplemental

27. The court did not err in refusing to permit a comparison of the Society of Good Neighbors with other charitable organizations. This claim of error is set forth as being based on the "transcript of proceedings of June 13,

1951, page 10 et seq". Beginning with the first question on page 10 thereof which is a question asked on direct examination of Jack D. Friedman, [265] an auditor, by assistant prosecutor Bolio, the transcript is as follows:

> "Q. Mr. Friedman, is there any difference in auditing the books of this type of business and any other type of business?
>
> The Court: Well, I don't know why they should get in for comparison of other types of business.
>
> Mr. Bolio: Just as far as auditing practices is concerned, if the court please.
>
> The Court: No.
>
> Mr. Davidow: I should like to have it, Your Honor.
>
> The Court: We have got enough here to handle with the case that is before us. I'm not going to permit that door to be opened by anybody. We aren't in the business of comparing other people.
>
> Mr. Bolio: With the court's suggestion, I will withdraw the question."

From the foregoing it is obvious that the court stopped the prosecution from going into a comparison of "auditing the books of this type of business and any other type of business". There is no mention here of a comparison with "other charitable organizations". The court ruled that such comparisons were not to be permitted, which was not error.

The court on other occasions sustained objections to attempts by defendants to offer or adduce testimony of bookkeeping practices, handling of needy cases, collection of merchandise for the needy, operation of bingo games of the Society of Good Neighbors as compared with other charitable organizations in the Detroit area. In this was no error. To have permitted such comparisons would have interminably lengthened the trial by the introduction of immaterial issues. That someone else or some other organization has operated or acted the same as the accused certainly is no test of fraud or the elements of any crime.

• • • • • • • • • • •

[275] 41—Supplemental

41. This claim of error as to an asserted failure by the court to apply a rule of law is untenable. Defendant testified, in part,

> "Our offices were broken into. Our files were rifled, many of them scattered on the floor, not case work files but business files, desks were rifled, the desk of office was rifled and the papers strewn all over. Occurred twice prior to February 3, 1948 . . . I took it up with the Police Department once, and they never did send a car over . . . I telephoned downtown here personally, and the second time based on the experience we have had elsewhere than there, we came to the conclusion that it was no use to call the police."

And Mr. Wade further testified that his home at Cass Lake had been entered and papers rifled and strewn over the floors, but nothing of tangible value taken; that the State Police had responded to the call of a neighbor, had looked around the windows [276] and had driven off; that he had telephoned the State Police, a man answered and said "Is this the fellow that had all the publicity in the papers?", that he (Wade) responded, "Yes", that the voice said, "That is a phoney call, you haven't had anything happen down there", that he (Wade) said, "Well, those jimmie marks on the front door certainly are not my imagination", and the voice answered, "We think it is a phoney call". Attorney Davidow stated to the court, "In my judgment it was the Police Department . . . and I shall so argue to the jury at the proper time, and the facts abundantly disclose it." The prosecution moved to strike the testimony on which motion the court withheld decision pending its being connected to anything material in the case. Morrison T. Wade then testified that his mother's car which was parked in front of the Wade home during the Grand Jury investigation during a week-end visit, was broken into and certain items, including the family Bible, some books and records, his father's Shrine fez and Knights Templar equipment removed and stated, "When next we heard about them they were in the Grand Jury." On ob-

jection of the prosecution and after a colloquy between counsel and court as to whether the testimony was that he *saw* these articles in the Grand Jury, the court ordered stricken as hearsay this statement as to hearing about them in the Grand Jury.

Mr. Wade also testified that Holiday House, a Wade enterprise, was ransacked approximately five times and the police were called and made an investigation.

After extended argument and citation of authority the Court held,

> "The Court: The Court has before it the transcript of a portion of the—I should say examination, it says cross-examination, the examination of Defendant Morrison T. Wade by Mr. Davidow concerning this portion or covering this, the proceedings pertinent to the motion to strike made on behalf of the Prosecution. The Court examined this, has examined this transcript and remembers also what the Court had heard which is substantially the same, of course, as the transcript indicates. There was no testimony tending to connect the Police Department with these breakings and enterings to which the defendant testified. I see no place whatsoever that there is any connection. The nearest that it comes to any testimony whatsoever, even about the police reaction, is testimony concerning conversations. One of them is that the state police without naming the state policeman, said to Mr. Wade, "We think it is a phoney call", with reference to the report of one of the claimed breakings and enterings.
>
> Secondly, there is—or strike the word secondly. Of course, that in no way connects [277] the police, either the state police or the Detroit City Police Department, with any affirmative act of breaking and entering on the premises of the defendant. There is no testimony whatsoever on which even an inference could be raised that it was the police that did it, as far as that piece of testimony is concerned.
>
> With respect to the testimony of Mr. Wade concerning a conversation, apparently a conversation at least with a Mr. Long who is identified in the record as having been Mr. William P. Long, one of the assistant

prosecuting attorneys assigned to the Groat one-man grand jury, I am reading that from page 16 of this excerpt before me, Mr. Wade's testimony in part was:

"Question (By Mr. Davidow) What is your recollection of what Mr. Long said?

Answer: He said any time I wanted to pick up the stuff, they would give it to me, but they never did."

Now, there is no connection between the word "stuff" and any claimed articles taken by way of any descriptive words or identifications of words. On two or three of these occasions of the breakings and enterings there was nothing tangible taken, at least so far as the record shows.

There was, according to the testimony on page 14, a breaking into of Mr. Wade's mother's car, and records—no, strike that, "the family bible, some of her books and records, my father's shrine Fez from the Sagasic Temple, his Knights of Templar, some of his Knights Templar equipment which she was taking to give part of it to my two sisters to give as keepsakes from Dad, were removed from the car," according to this testimony of Mr. Wade's, and further according to his testimony quoting, "and when next we heard about them they were in the grand jury."

Now, there is—the breaking and entering of a car for the removal of Knights Templar equipment by the Police Department is not shown by any stretch of the imagination here. There is no testimony here of any of the police being present, and there is no showing that the police were present, as I say, at that time or that any description of the "stuff" the word "stuff" refers to anything alleged to have been taken. The motion to strike, therefore, I think is well taken for the reason that there is no testimony of probative force connecting the claimed [278] breakings and enterings with any conspiracy on the part of the Police Department or any breaking and entering concerning which testimony has been had, with any affirmative act by the Police Department of a breaking and entering nature."

The court still considers the granting of the motion to strike was proper. See *People* v. *Brunstein*, 261 Mich. 535 at 537.

• • • • • • • • • •

[297] Dated: March 12, 1953
Detroit, Michigan

/S/ JAMES R. BREAKEY, JR.
Circuit Judge
Acting as Recorders Court
Judge.

APPENDIX B

1. One-Judge Grand Jury Statute

As amended by Act. #276, Public Acts of Michigan of 1951. (*Amendments are italicized.*)

Sec. 3, Chapter 287 Code of Criminal Procedure, M.S.A. § 28.943. Proceedings before trial; investigation of suspected offenses by judge *of court of record;* inquiry; witnesses; *participants in inquiry, disqualification from appointment or election.*

Whenever by reason of the filing of any complaint, which may be upon information and belief, *or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record* shall have probable cause to suspect that any crime, offense or misdemeanor shall have been committed within his jurisdiction, *and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;* and the proceedings to summon such *witness* and to compel *him* to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall *not receive any compensation or remuneration other than witness fees as paid witnesses* in other criminal proceedings, *and said witnesses shall not be employed in any capacity by the judge or any person connected with such inquiry, with-*

in the scope of the said inquiry being conducted. Whenever a subpoena shall be issued by the *judge* conducting such inquiry, commanding the appearance of a witness before such *judge* forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the *judge* so issuing the same shall be *forthwith* notified of such *appearance* by the officer serving the subpoena, and it shall thereupon be the duty of such *judge forthwith* to appear and take the testimony of such witness. *Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.*

Any *judge,* prosecuting *attorney* or special prosecuting *attorney,* or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than *1* year from date of termination of such inquiry, as determined by final order of said *judge* entered prior to such date.

Sec. 4, Chapter 287, Code of Criminal Procedure, Sec. 28.944, Michigan Statutes Annotated:

Title: Same; apprehension of suspected person; *disqualification of investigating judge in later proceedings;* removal of public officers, procedure; disclosure of *information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry; appointment of successor judge.*

If upon such inquiry the *judge* shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, *he* may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the *judge* having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: Provided, That the *judge* conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, *except alleged contempt for neglect or refusal to appear in response to a summons or subpoena.* And if upon such inquiry the *judge* shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance *in* office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said *judge* shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law of conduct removal proceedings against said officer .... *Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,* any *judge* conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such *judge* be admitted to such inquiry, who shall *while conducting such inquiry or while* in the services of *such*

udge or after his services with *such judge* shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or *under* recognizance, or who shall disclose that any person has been questioned or *summoned* in connection with such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 or more than *$1,000.00* or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office."

Same: apprehension of suspected person; removal of public officers, procedure; disclosure of statement.

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis of removal of

said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

2. The Fourteenth Amendment to the Constitution of the United States

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FILED
MAY 31 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

October Term, 1954

No. [redacted] 43

On Appeal to the Supreme Court of the State of Michigan

MORRISON T. WADE AND BESSIE LOU WADE,
Appellants

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

MOTION TO DISMISS

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In the Supreme Court of the United States

October Term, 1954

No. 692

On Appeal to the Supreme Court of the State of Michigan

MORRISON T. WADE AND BESSIE LOU WADE,
Appellants

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

MOTION TO DISMISS

The People of the State of Michigan, appellee herein, respectfully moves that the appeal of Morrison T. Wade and Bessie Lou Wade, appellants, be dismissed on the following grounds:

1. In their notice of appeal (Appendix "A," post, p. A-1) and amended notice of appeal (Appendix "B," post, p. A-7, filed with the clerk of the recorder's court of the city of Detroit, designating among other things the judgment or part thereof appealed from, Revised Rule 10, appellants appealed to this Court "from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954," an order not reviewable under 28 U.S.C. § 1257 (2).

2.

(a) The first two questions set forth in appellants' amended notice of appeal (Appendix "B," post, p. A-9), are not expressed "in the terms and circumstances of the case," as required by Revised Rule 10 (2) (c).

(b) The third and last question set forth in appellants' amended notice of appeal, together with its 4 subsidiary questions, does not involve "the validity of a statute" of the State of Michigan "on the ground of its being repugnant to the Constitution, treaties or laws of the United States," 28 U.S.C. § 1257 (2), but comprises a question more appropriately to be considered on petition for certiorari, 28 U.S.C. § 1257 (3).

(c) The first question presented in appellants' jurisdictional statement, p. 3, is not "expressed in the terms and circumstances of the case," as required by Revised Rule 15 (1) (c) (1).

(d) The remaining questions presented in appellants' jurisdictional statement, p. 3 and p. 4, are additional to those set forth in their amended notice of appeal (Appendix "B," p. A-7), contrary to Revised Rule 15 (2).

3. No substantial federal question is presented for review under 28 U.S.C. § 1257 (2).

ARGUMENT

1

In their jurisdictional statement, p. 2, counsel inadvertently allege "this is an appeal from a sentence of conviction

in the Recorder's Court of the City of Detroit," though this is not precisely correct. While a formal notice of appeal and an amended notice of the same tenor were timely filed with the clerk of the recorder's court of the city of Detroit as the court possessing the record, the appeal so taken is from the Supreme Court of the State of Michigan. We publish as Appendix "A," post, p. A-1, a true copy of the notice of appeal so filed, and as Appendix "B," post, p. A-7), a true copy of the amended notice of appeal. In each instance the opening paragraph reads:

> "I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954."

Such appeal was taken pursuant to 28 U.S.C. § 1257 (2) which reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) .....

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

While we do not desire to quibble or take advantage of a mere technical error in procedure, and although counsel

may have intended to take an appeal from the conviction and sentence of the trial court, we nevertheless conceive it our duty to invite attention to the following.

A. Michigan law provides:[1]

> "Sec. 3. Writs of error in criminal cases shall issue only in the discretion of the supreme court or any justice thereof, on proper application."

And Michigan Court Rule 60, § 2, maps procedure on application for leave to appeal in such cases. Appendix "C," post, p. A-13.

Thus it follows that when, on the 11th day of June 1954, appellants filed their application for leave to appeal, the privilege was one of grace and discretion rather than of right.[2]

B. Decisions of this Court bear out a recent text-book statement, Stern's Supreme Court Practice (2d Ed. 1954), p. 78, to the effect that if the highest court of a State declines to review a case, the trial court's judgment becomes that of the highest court in which decision could be had.[3] And a quite recent opinion bears this out,

---

[1] Mich. Code of Criminal Procedure, Chap. X, § 3 [Comp. Laws 1948, § 770.1 (Mich. Stat. Ann. [Henderson] § 28.1100)].

[2] On the 13th day of August 1954, Michigan Public Act No. 53 of that year became effective, providing inter alia that writs of error might issue as of course out of the Supreme Court to review final judgments "in all criminal cases involving the personal liberty of a party thereto." In their motion to reconsider, appellants directed attention to this subsequent Act, but the Court rejected it. Moreover, the constitutional validity of Act 53 of 1954 is presently challenged in a cause pending in the Michigan Supreme Court.

[3] Citing: Minneapolis, St. P. & S.S. M.R. Co. v. Rock, 279 U.S. 410; Virginian R. Co. v. Mullens, 271 U.S. 220.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-160.

In the case at bar, upon application of these appellants, the Michigan Supreme Court denied leave to appeal and later refused to reconsider the matter. From this final order appellants appeal to this Court. And this Court is now called upon to determine whether jurisdiction now lies to review the conviction and judgment of the trial court despite the error in the notice to appeal.

2

A. While Revised Rule 10 discourages unnecessary detail in setting forth the questions presented in a notice of appeal, although the statement of such questions should be short and concise, and while the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein, nevertheless the rule does require that questions be "expressed in the terms and circumstances of the case."

We respectfully suggest that the first two questions set forth in appellants' amended notice of appeal (Appendix "B," post, p. A-12) do not meet this requirement of the rule.

Question "1" merely asserts in substance and effect, without any relation to the terms and circumstances of the case, that Michigan's 1-Man Grand Jury Law (citing it) "is repugnant to Section 1, Article XIV of the Amendments to the Constitution of the United States, and therefor is unconstitutional. And it fails to state in what manner violence was done to the Due Process Clause.

Question "2" is still more vague and indefinite in that it merely asserts, without any explanation whatsoever, that the Act challenged, is repugnant "to Section 4 of Article IV of the Constitution of the United States."[4]

B. The remedy here invoked is appeal rather than certiorari and in filing their notice of appeal the appellants have chosen a road to travel into this Court. They cannot change the signposts.

An appeal under 28 U.S.C. § 1257 (2) may be taken only where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The third question set forth in appellants' notice of appeal is based on the claim that they were denied equal protection of the laws and were deprived of their liberty and property without due process of law in violation of the 14th Amendment by reason of certain specified "substantial errors" numbered from (1) to (4), inclusive (Appendix "B," post, p. A-8. Such "substantial errors" presumably occurred in the course of criminal proceedings commencing with the empaneling of a petit jury, indeed, points 1, 2, and 3 have to do with the conduct of the jury.

Boiled down, such claims of error are these: (1) the misconduct of a juror in the commission of perjury upon her voir dire examination; (2) alleged illegality in assembling a list of jurors for the panel; (3) alleged tampering with the jury by members of the Detroit police department; and

---

[4] It goes without saying of course that enforcement of this constitutional guaranty of a republican form of government is for Congress, not the courts. State of Ohio ex rel., v. Akron Metropolitan Dist., 281 U.S. 74. How it may be applied to the case at bar is not disclosed by the question stated in the notice of appeal.

(4) a shift in the theory of the prosecution as the trial proceeded. All of which are alleged to have resulted in a miscarriage of justice.

It requires little, if any, effort to demonstrate that in assigning such errors, the appellants have failed to draw in question the validity of any statute of Michigan on constitutional grounds.

C. The first question presented in appellants' jurisdictional statement, p. 3, like its predecessor in their notice of appeal, is not "expressed in the terms and circumstances of the case," as required by Revised Rule 15 (1) (c) (1).

That question reads:

> "1. Does the Michigan judge-grand jury statute, either generally or as applied in this case, violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?"

It is quite true that this question as stated, unlike its counterpart in the notice of appeal, reads "as applied in this case," and it might possibly be said that it should pass muster for that reason, though here again it indicates absolutely nothing concerning "the terms and circumstances of the case."

D. The trouble is, however, that while in Questions 2, 3, 4, 5, and 6, counsel proceed to elaborate upon the theme of Question 1, they state questions not covered in their notice of appeal. The third question set forth in such notice (which as we have seen assigns 4 irrelevant errors having no relation to the 1-Man Grand Jury Law) is wholly abandoned and in its place we find 5 constitutional questions which were not defined in the notice of appeal.

Again not desiring to be considered overly-technical, we most respectfully submit these questions of jurisdiction to the Court.

3

Assuming for the sake of argument that appellants' notice of appeal is in order, and that the questions presented in their jurisdictional statement are consistent therewith, we would respectfully suggest that no substantial federal question is involved.

We do not deem it appropriate in a motion to dismiss, to enter into a full discussion of the merits, nor do we deem it essential to such purpose that we point out inaccuracies or omissions in appellants' statement of the case. To do so would require an exhaustive review and analysis of the record.[5] Suffice it to say that each of the following points stressed by counsel bears its own peculiar infirmity:

A. Contending that Michigan's "One-Judge Grand Jury System is not in accord with Due Process of Law," appellants argue somewhat as follows:

1. It is said that "indictment by the court destroys the presumption of innocence." The trouble with such a conclusion is that despite counsel's criticism of the system, a 1-man grand jury inquiry culminates in no more than a warrant authorizing arrest.

---

[5] While the record in this cause as so far compiled, comprises in part the concise statement of facts and proceedings certified by the trial judge, upon which the Michigan Supreme Court passed in denying leave to appeal, and though it covers 461 or more typewritten pages, many of the questions presented could not possibly be answered without the benefit of the nisi prius record.

Although the word is frequently used in connection with this law, the 1-man grand jury procedure does not lead to an "indictment" and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate for a preliminary examination to determine whether an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith. If the magistrate so finds, he "shall forthwith bind such defendant to appear before" a court of competent jurisdiction for trial.

We therefore publish as Appendix D, a true copy of §§ 1-5, incl., and § 13 of Chapter 6 of the Michigan Code of Criminal Procedure, captioned "Examination of Offenders" [Comp. Laws 1948, §§ 766.1-766.5 and 766.13 (Stat. Ann. 1954 Rev. §§ 28.919-28.923 and 28.931)].

Counsel argue, p. 12, that when a judge-grand-juror issues process, he in effect "declares that his plenary inquisition has demonstrated the probable guilt of the accused," thus destroying the presumption of innocence. But the statute, § 4 provides that such a judge need only be satisfied that a crime has been committed and that "there is probable cause to *suspect* any person or persons to be guilty thereof." [Emphasis, ours].

Since such process merely brings the accused before a magistrate for a preliminary examination to determine whether probable cause exists to hold him for trial, appellants' argument places undue emphasis on the initial step in a criminal prosecution, for after all a judge who issues a warrant after conducting a 1-man grand jury investigation, is no more than a magistrate.

Moreover, in the case at bar, although the warrant was issued by the Honorable Gerald W. Groat, the judge who conducted the investigation,[6] the preliminary examination of the defendants was conducted by the Honorable George Murphy, another member of that court (R. 37), while further preliminary motions were heard by Judge John P. Scallen (R. 39). Several years after the warrant issued, a jury was impaneled before a visiting circuit judge from the county of Washtenaw, who had been assigned to the task by the presiding judge of the State.[7]

This Court in a recent decision, *Frisbie v. Collins,* 342 U.S. 519, 522, held that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction, and, in the course of an opinion written by Mr. Justice Black, it was said that.

> "due process of law is satisfied when one present in court after being fairly apprised of the charges against him and after a fair trial in accordance with constitutional safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

It has also been held that due process does not require the State to adopt a particular form of procedure, "so long

---

[6]

During such investigation, the matter came before this Court on a collateral issue. Morrison T. Wade v. The People of the State of Michigan; No. 453, October Term 1948; certiorari denied, 336 U.S. 924; rehearing denied, 336 U.S. 947.

[7]

This would seem to satisfy due process as defined In the Matter of Murchison and White, No. 405 October Term 1954.

as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution."[8] Nor does it require an examination, or the opportunity for one, prior to a formal accusation by the district attorney by information.[9]

We therefore respectfully suggest that the method by which a warrant authorizing an arrest is issued, if followed by a fair trial, does not deny due process of law.

2. Once again we are confronted with the claim that Michigan's 1-man grand jury system invades the independence of the judiciary by commingling the investigative and adjudication functions.

The trouble with such an argument when addressed to this Court, is that it cannot be based upon the Federal Constitution but is a problem controlled by state law.

Dryer v. Illinois, 187 US 71, 84;
Crowell v. Benson, 285 US 22, 57;
Highland Farms Dairy v. Agnew, 300 US 608, 612.

Moreover, the highest court of the State has held,

In re Slattery, 310 Mich 458; cert. den., 325 US 876,

that a grand juror proceeding under this act is a judicial officer, not a prosecuting attorney, policeman or detective,

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[8] Rogers v. Peck, 199 U.S. 425, 433; f. in Garland v. Washington, 232 U.S. 642, 645-646.

[9] Woon v. Oregon, 229 U.S. 586 (f. in People v. McCrea, 303 Mich. 213, 248; certiorari denied, 318 U.S. 783). Please see also, Barber v. United States, 142 F. 2d 805, 807; Snell v. Mayo, 173 F. 2d 704; certiorari denied, 338 U.S. 905.

and that the statute in question does no violence to Article IV of the State Constitution.

The Michigan statute, in operation, is not subject to the condemnation of Judge Cardozo leveled upon the proceedings involved

In re Richardson, 247 N.Y. 401.

As noted in the opinion written by Mr. Justice Butzel In the case of *Slattery, supra,*

> "The sole issue in the *Richardson Case* was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary."

This rule cannot be applied to Michigan's 1-man grand jury proceeding, however, for under that act as under the Federal system, the proceeding before a grand jury constitutes a judicial proceeding, *Cobbledick v. United States,* 309 U.S. 323.

Furthermore, under Michigan's system, justices of the peace, circuit judges and justices of the Supreme Court are deemed conservators of the peace within their respective jurisdictions. Const. Mich. 1908, Article VII, § 18.

Petitioners here, as did counsel in *Slattery, supra,* probably will claim that the office of conservator of the peace

is a different position from that of a judicial officer. But the Michigan Supreme Court in the case of *Slattery* set the question at rest, 310 Mich. at 466. And it should be observed that Judge Cardozo *In re Richardson*, 247 N.Y. at 412, pointed out by way of analogy that a magistrate before whom there is laid an information of the commission of a crime, conducts a *judicial inquiry* when after finding that a crime has been committed, and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest.

B. Finally, it is contended that as applied the 1-man grand jury system deprived the appellants of due process of law, and to support this claim counsel make several assertions which could scarcely be characterized as understatements.

1. It is said, p. 18, that appellants "were condemned long prior to the petit jury trial by the Recorder's Court itself," whereas, as a matter of fact, the court itself did not condemn them but one of its members merely found sufficient cause to issue a warrant authorizing their arrest on a criminal charge.

Counsel also say that "when the case was brought to trial appellants were already under the cloud of a judicial finding of probable guilt." The answer is that this would apply to any person accused of crime in a warrant issued by a magistrate.

2. Appellants also complain that the trial judge himself emphasized the high source of the original charge, when he instructed the jury they had no "right to be influenced by the fact that the defendants have been brought into this court through the action of a one-man grand

jury." This charge of the court was designed, we submit, for the protection of the defendants, not to prejudice their cause, and a somewhat similar instruction was included in appellants' request to charge (No. 2. R.p. 347). Moreover, this short excerpt from the trial judge's instructions should be considered in the light of the entire charge to the jury (Exhibit T, R.pp. 374-451) rather than as wrested from its context.

Further points attempted to be made should not be considered on appeal. They do not involve the validity of the 1-man grand jury statute.

WHEREFORE, appellee respectfully moves that the within appeal be dismissed.

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Appellee
The Capitol, Lansing 2, Mich.

Appendix "A"

Notice of Appeal to the Supreme Court of the United States from the Supreme Court of the State of Michigan.

(Filed in the Recorder's Court of the City of Detroit Dec. 17, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellants were convicted of the crime of conspiring to cheat and defraud, and conspiracy to obtain property by false pretenses, gross cheat and fraud, and obtaining property by false pretenses; appellant Morrison T. Wade was sentenced to four to ten years imprisonment; and appellant Bessie Lou Tanner Wade was sentenced to five years probation and to pay a fine of $3,000 and costs of $2,000; and the judgment as to appellant Bessie Lou Tanner Wade was stayed; and appellant Morrison T. Wade is presently released on bail in the sum of $5,000, both as ordered on November 1, 1954, by Justice Stanley Reed, Associate Justice, United States Supreme Court.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Hearing on Motion for New Trial, and attached Motion for New Trial and Supplement to Motion for New Trial.

2. Opinion of Judge Breakey, Circuit Judge Acting as Recorder's Court Judge, dated March 12, 1953.

3. Application for Leave to Appeal.

4. Brief in Support of Defendants' Application for Leave to Appeal.

III. The following questions are presented by this appeal:

1.

The so-called one-man grand jury law of the State of Michigan (being Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan of 1917, as amended by Act 395 of the Public Acts of 1921, being sections 28.943 and 28.944, Michigan Statutes Annotated, and being Sections 3 and 4, Chapter VII of Chapter 287 of the Code of Criminal Procedure of the State of Michigan) is repugnant to Section 1, Article XIV. of the Amendments to the Constitution of the United States, and therefore is unconstitutional.

2.

The so-called one man grand jury law of the State of Michigan, supra, is unconstitutional in that it is repugnant to Section 4 of Article IV. of the Constitution of the United States.

3.

Defendants were denied the equal protection of the laws and were deprived of their liberty and property without due process of the law, in violation of Section 1, Article XIV. of the Amendments to the Constitution of the United States, by reason of the following substantial errors:

(1) A false swearing on the part of a juror on the voir dire in order to get on the jury, that she was not acquainted with any member of the metropolitan police force of Detroit; whereas, as a matter of fact she was a next door neighbor for many years and a very good friend of a Detroit police officer who was an attache in the courtroom of Judge Arthur E. Gordon of the Recorder's Court of the

City of Detroit, which fact counsel for defendants had no way of anticipating and which was not disclosed until after the verdict of the jury was rendered. (Defendants had challenged for cause every prospective juror who indicated any acquaintance or friendship with any member of the metropolitan Police Department of Detroit because of defendants' claim that the proceedings against them were instigated by Kennedy Lawrence, Deputy Superintendent of the Police Department of Detroit, who, defendants claimed had threatened "to get Morrison T. Wade".)

(2) The list of jurors' names from which the jurors were chosen in the case in the Recorder's Court, was limited alphabetically from A to H, the names of the jury panel having been divided alphabetically into three boxes, so that defendants were deprived of their right to have a jury picked from the entire panel, which facts were not known to defendants or their counsel until after the trial of the cause had been concluded. The name of the juror, above referred to, who had sworn falsely on the voir dire, began with the letter "E".

(3) The record shows there was a tampering on the part of the Detroit Police Department with the jury during the trial of the cause, which tampering was not investigated as promised by the Trial Court, as a result of which defendants were lulled into a false sense of security and did not demand a mistrial, to which they were entitled.

(4) While defendants were charged with cheating and defrauding the citizens of Detroit by means of alleged misrepresentations and conspiracy so to do, the theory of the prosecution in the trial of the case was based upon embezzlement, and the charge of the Court was likewise based upon embezzlement, by reason of which there was a fatal variance and defendants suffered irreparable injury there-

by, and if the verdict and sentence are permitted to stand, they will result in a gross miscarriage of justice.

LARRY S. DAVIDOW,
Attorney for Morrison T. Wade
and Bessie Lou Tanner Wade

3210 Book Tower
Detroit 26, Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney for Morrison T. Wade and Bessie Lou Tanner Wade, defendants and appellants herein, and that on the 17th day of December, 1954, he served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

Deponent further says that on December 17, 1954, he filed a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, in the Recorder's Court for the City of Detroit, by depositing a copy thereof with the Clerk of the Recorder's Court for the City of Detroit, County of Wayne, State of Michigan.

Subscribed and sworn to before me this 17th day of December, A.D., 1954,

NELL M. YORGEN,
Notary Public, Wayne County, Michigan

My commission expires November 11, 1957.

Appendix "B"

Amended Notice of Appeal to the Supreme Court of the United States from the Supreme Court of the State of Michigan.

(Filed in the Recorder's Court of the City of Detroit Dec. 28, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney for Morrison T. Wade and Bessie Lou Tanner Wade, defendants and appellants herein, and that on the 17th day of December, 1954, he served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

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NELL M. YORGEN,
Notary Public, Wayne County, Michigan

My commission expires November 11, 1957.

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(Filed in the Recorder's Court of the City of Detroit Dec. 28, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan

denying their petition for reconsideration of the denial of their application for leave to appeal entered on October 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellants were convicted of the crime of conspiring to cheat and defraud, and conspiracy to obtain property by false pretenses, gross cheat and fraud, and obtaining property by false pretenses; appellant Morrison T. Wade was sentenced to four to ten years imprisonment; and appellant Bessie Lou Tanner Wade was sentenced to five years probation and to pay a fine of $3,000 and costs of $2,000; and the judgment as to appellant Bessie Lou Tanner Wade was stayed; and appellant Morrison T. Wade is presently released on bail in the sum of $5,000, both as ordered on November 1, 1954, by Justice Stanley Reed, Associate Justice, United States Supreme Court.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Hearing on Motion for New Trial, and attached Motion for New Trial and Supplement to Motion for New Trial.

2. Opinion of Judge Breakey, Circuit Judge Acting as Recorder's Court Judge, dated March 12, 1953.

3. Application for Leave to Appeal.

4. Order of the Supreme Court of Michigan denying the Application for Leave to Appeal.

III. The following questions are presented by this appeal:

1.

The so-called one-man grand jury law of the State of Michigan (being Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan of 1917, as amended by Act 395 of the Public Acts of 1921, being Sections 28.943 and 28.944, Michigan Statutes Annotated, and being Sections 3 and 4, Chapter VII of Chapter 287 of the Code of Criminal Procedure of the State of Michigan) is repugnant to Section 1, Article XIV. of the Amendments to the Constitution of the United States, and therefore is unconstitutional.

2.

The so-called one-man grand jury law of the State of Michigan, supra, is unconstitutional in that it is repugnant to Section 4 of Article IV. of the Constitution of the United States.

3.

Defendants were denied the equal protection of the laws and were deprived of their liberty and property without due process of the law, in violation of Section 1, Article XIV. of the Amendments to the Constitution of the United States, by reason of the following substantial errors:

(1) A false swearing on the part of a juror on the voir dire in order to get on the jury, that she was not acquainted with any member of the metropolitan police force of Detroit; whereas, as a matter of fact she was a next door

neighbor for many years and a very good friend of a Detroit police officer who was an attache in the courtroom of Judge Arthur E. Gordon of the Recorder's Court of the City of Detroit, which fact counsel for defendants had no way of anticipating and which was not disclosed until after the verdict of the jury was rendered. (Defendants had challenged for cause every prospective juror who indicated any acquaintance or friendship with any member of the metropolitan Police Department of Detroit because of defendants' claim that the proceedings against them were instigated by Kennedy Lawrence, Deputy Superintendent of the Police Department of Detroit, who, defendants claimed had threatened "to get Morrison T. Wade").

(2) The list of jurors' names from which the jurors were chosen in the case in the Recorder's Court, was limited alphabetically from A to H, the names of the jury panel having been divided alphabetically into three boxes, so that defendants were deprived of their right to have a jury picked from the entire panel, which facts were not known to defendants or their counsel until after the trial of the cause had been concluded. The name of the juror, above referred to, who had sworn falsely on the voir dire, began with the letter "E".

(3) The record shows there was a tampering on the part of the Detroit Police Department with the jury during the trial of the cause, which tampering was not investigated as promised by the Trial Court, as a result of which defendants were lulled into a false sense of security and did not demand a mistrial, to which they were entitled.

(4) While defendants were charged with cheating and defrauding the citizens of Detroit by means of alleged misrepresentations and conspiracy so to do, the theory of the prosecution in the trial of the case was based upon em-

bezzlement, and the charge of the Court was likewise based upon embezzlement, by reason of which there was a fatal variance and defendants suffered irreparable injury thereby, and if the verdict and sentence are permitted to stand, they will result in a gross miscarriage of justice.

LARRY S. DAVIDOW,
Attorney for Morrison T. Wade
and Bessie Lou Tanner Wade

3210 Book Tower
Detroit 26, Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

JAMES RENFREW, being duly sworn, deposes and says that on the 28th day of December, 1954, he served a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

Deponent further says that on December 28, 1954, he filed a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States, in the Recorder's Court for the City of Detroit, Michigan, by depositing a copy thereof with the Clerk of the Recorder's Court for the City of Detroit, County of Wayne, State of Michigan.

Subscribed and sworn to before me this 28th day of December, A.D., 1954.

Notary Public, Wayne County, Michigan

My commission expires Nov. 11, 1957.

Appendix "C"

Michigan Court Rule 60, § 2, mapping procedure to obtain leave to appeal to Supreme Court.

Sec. 2. To obtain leave to appeal to the Supreme Court from a court of record, appellant shall within the time limited for taking an appeal as of right (except when delayed appeal is sought);

(a) Prepare an application for leave to appeal, setting forth the reasons and grounds of appeal, and attach to it a concise statement of the proceedings and facts as far as they are material. In all cases where error is alleged in the charge of the court, the whole of the charge shall be set up in the statement. It shall also contain the date of entry and a copy of the judgment, decree or order appealed from, and the opinion of the court, if one has been filed, or dictated to the court reporter.

The application shall further state whether general appeal or appeal in the nature of mandamus, certiorari, prohibition, et cetera, is sought.

In criminal cases the application shall also state (1) the sentence imposed, and (2) if defendant desires bail pending appeal, the amount of bail set by the trial court pending application for leave to appeal, if any was set.

(b) Serve copy of the application and concise statement on all other parties, whether joint or adverse, with notice of prompt settlement of the statement before the trial judge or any other judge having jurisdiction to settle a bill of exceptions in the case. See Rule 66, § 13.

(c) Objections to the concise statement shall be settled by the judge and, when satisfied, he shall certify that it fairly presents the questions for review.

A transcript of the testimony shall not be required as a basis for the settlement. The judge settling such statement may correct it or add matters of record which he may deem necessary to present the issue properly. When a discretionary action of the court is to be reviewed, the judge may add to the statement his reasons for such action. In case appellant shall object to corrections or additions made to the statement by the judge, he may further present, with his application, true copies of pleadings and exhibits and a transcript of the relevant testimony relating to the question for review.

(d) Promptly after the statement is settled and certified, appellant shall file the application and certified statement with the clerk of the Supreme Court and notice it for hearing as a motion.

(e) With service of notice of hearing, appellant shall serve on all other parties a typewritten or printed brief in support of such application and make proof of service thereof. Any party may file brief in opposition to the application.

Appendix "D"

Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure—"Examination of Offenders."

"Sec. 1. The state and accused shall be entitled to a prompt examination and determination by the examining

magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination." [Michigan Stat. Ann. (Henderson) § 28.919].

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him." [Michigan Stat. Ann. (Henderson) § 28.920].

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." [Michigan Stat. Ann. (Henderson) § 28.921].

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent." [Michigan Stat. Ann. (Henderson) § 28.922].

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial." [Michigan Stat. Ann. (Henderson) § 28.923].

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial." [Michigan Stat. Ann. (Henderson) § 28.931].

FILED
JUN 24
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE AND BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

REPLY BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE AND BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

REPLY BRIEF OF APPELLANTS

This is a criminal case. It comes to the Court from a conviction on verdict of guilty by a jury on a charge of "gross cheats" (R. 299, 310). The proceeding was instituted by a one-judge grand juror, under the Michigan statute. This investigation lasted five months. It was a cause celebre, widely reported in the press (R. 9, 124-125, 155, 327, 328). Every one of the petit jurors subsequently empanelled for the trial had read about the judicial inquisition (R. 155). Convinced that this procedure violated their constitutional rights to "due process" under the Fourteenth Amendment to the Constitution and worked to their substantial prejudice at the trial, appellants sought review here. Their Statement of Jurisdiction concentrated on the

constitutionality of the Michigan one-judge grand jury system, a question which this Court has noted but failed to pass on in *In re Oliver*, 333 U. S. 257, and *In re Murchison*, 75 S. Ct. 623, — U. S. — (1955).

Appellee has moved this Court to dismiss the appeal.

1. The appellee contends that petitioners made a "mere technical error in procedure" by stating, on their Jurisdictional Statement, that "this is an appeal from a sentence of conviction in the Recorder's Court of the City of Detroit." But the very authorities cited by appellee, including *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 159-161, are quite clear that when the highest court of the state denies a discretionary appeal, as here, appeal to this Court is from the trial court.

2. The second ground for dismissal is that the questions presented are not sufficiently explicit. Our statement of issues is based on the language of this Court. The question here is the question left open in *In re Oliver*, 333 U. S. 257, 264:

> "The petitioner does not here challenge *the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge*, and therefore we do not concern ourselves with that question." (Emphasis supplied).

3. Finally, appellee contends that the question is not worthy of appeal. We contend that indictment by the Court destroys the presumption of innocence, and invades the independence of the judiciary, because of its inevitable impact on a later criminal trial. Appellee answers with the propositions that under the statute the final order of the grand-juror is technically an order to bind the defendants to appear for trial rather than an "indictment", and that this procedure does not result in a "commingling of the function of the investigative and adjudication functions" because it has been held to be purely "judicial" in *In re*

Slattery, 310 Mich. 458, 17 N. W. 2d 251, cert. den. 325 U. S. 876. Neither of these contentions reaches the heart of our argument that the procedure violates the Constitution. The name of the process issued by the judge is immaterial; the characterization of the function he performs is of no moment. Petitioners are convinced that the extensive grand jury investigation prejudiced their later trial. They were tried on an accusation by a member of the bench. The judge who interrogated the witnesses and drafted the charge was acting with all the authority of one who acts as a "judicial officer", as the *Slattery* case itself holds. Judicial accusation has its inevitable impact on both the trial court and the jury. We think it deprived petitioners of the fair trial they were entitled to.

This is an important issue. The Michigan system is unique. It is the only one, in the whole history of Anglo-Saxon jurisprudence, where the court itself after an extensive investigation institutes the criminal proceedings. We think that power is ripe for review. The Court has twice before considered, and severely limited, the contempt power of judge grand-jurors under the Michigan system. *In re Oliver, supra, In re Murchison, supra.* We think that the analysis of the system in those two cases support our contentions here. As the Court has recently said in *In re Murchison*, 75 S. Ct. at 625-626:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as

a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' *Tumey* v. *Ohio*, 273 U. S. 510, 532. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U. S. 11. . .

". . . A single 'judge-grand jury' is even more part of the accusatory process than an ordinary lay grand juror. Having been a part of that process *a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.* While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal." (Emphasis supplied).

The Court held that "As a *practical matter* it is *difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' session.*" (Emphasis supplied) Our position is similar: "in the very nature of things" it is not possible for a fellow judge, or a jury, to treat an accusation by the court with strict impartiality. The court having been made a "part of the accusatory process . . .", the possibility, and even the appearance, of a fair trial vanishes. See *Offutt* v. *United States*, 348 U. S. 11. In *Murchison* the judge-grand juror was barred from passing directly on contempt proceedings arising out of testimony before him in his role as an investigator. This was so because in the generality of cases most judges would be personally influenced against the defendant. By a parity of reasoning, the Michigan procedure which employs the Court to make the initial accusation denies due process to the defendant at the eventual trial. Judicial accusation has an inevitable effect on the judge and jury in the trial on the merits.

For the reasons stated, we think the appeal presents an important constitutional question within the jurisdiction of this Court.

Respectfully submitted,

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Washington 6, D. C.

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Detroit, Michigan
Of Counsel

FILED
NOV 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE and BESSIE LOU WADE,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR REHEARING FROM THE DISMISSAL OF THE APPEAL OF MORRISON T. WADE AND BESSIE LOU WADE

DAVIDOW & DAVIDOW,
By LARRY S. DAVIDOW,
Attorneys for Petitioners,
3210 Book Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

SUBJECT INDEX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE and BESSIE LOU WADE,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR REHEARING FROM THE DISMISSAL OF THE APPEAL OF MORRISON T. WADE AND BESSIE LOU WADE

Petitioners Morrison T. Wade and Bessie Lou Wade pray that this Court grant a rehearing from its Order of October 10, 1955, dismissing petitioners' appeal, and that the appeal be granted and/or a Writ of Certiorari issue to review the judgment of the Recorder's Court of the City

of Detroit, State of Michigan, in the above entitled cause, as prayed for in the appeal filed by petitioners on December 28, 1954.

Petitioners show that while this petition is in the form of a petition for rehearing, in fact it may be considered as a petition for Writ of Certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Petitioners show that the only question presented in the appeal and Jurisdictional Statement previously filed in this Court and cause, was the constitutionality of the One-Man-Judge-Grand Jury created by a statute of the State of Michigan (Section 28.943-4, Michigan Statutes Annotated).

Petitioners state that there has been no decision upon the merits of the issues presented below at any stage of the proceedings.

2. Petitioners show that they have been deprived of their liberty without due process of law and have been denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, by reason of the following:

False Swearing of Juror on Voir Dire

A. Petitioners and appellants filed an affirmative defense in the Recorder's Court of the City of Detroit charging the then Superintendent of the Detroit Police Department with threatening the petitioners.

Therefore, at the time of the trial, when the jury was being selected, petitioners asked to have the question put to prospective jurors on the *voir dire* as to their acquain-

tanceship and/or friendship wtih police officers of the metropolitan Police Department of the City of Detroit. (Every juror who answered in the affirmative was excused.) On the *voir dire,* juror Eshelman stated under oath that she was not acquainted with any member of the metropolitan police department of the City of Detroit. After the trial, it was ascertained that for fifteen years juror Eshelman had been and was a next-door neighbor and close friend of a police officer who was an attache of the Recorder's Court of the City of Detroit during sessions of the One-Man Grand Jury proceedings being conducted by the Honorable Gerald W. Groat, which had returned the process of arrest against petitioners. (See affidavit of Kathleen S. Frede, marked Exhibit 1 attached hereto.)

In the case of *Clark v. U. S.,* 289 U. S. 1; 77 L. Ed. 993, which was a case involving criminal contempt proceedings against a juror biased on the defendant's behalf, Mr. Justice Cardozo said that there was an "*overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.*" (Italics ours.) This Court and others are not unmindful of the greater and more fundamental necessity that an accused has a right to jury trial free of pre-existing juror bias against him. The Michigan Supreme Court, in the case of *People v. DeHaven,* reported in 321 Mich. 327, supports the principle referred to in *Clark v. U. S., supra* (pp. 331, 332):

> "In *39 Am. Jur.,* pp. 65, 66, §45, under the subject of 'New Trial' we find the following:
>
> " 'It seems generally agreed that when matters which might establish prejudice or work a disqualification of a juror are actually gone into upon the *voir dire* examination and false answers are given or deception is otherwise practiced, as the result of which a juror, although disqualified in fact, is accepted, the party misled or deceived thereby, upon

discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though, it has been held, the bias or prejudice is not shown to have caused an unjust verdict; *it is sufficient that a party, through no fault of his own, has been deprived of his constitutional statutory guaranty of a trial of his case before a fair and impartial jury.*'" (Italics ours.)

Petitioners also learned for the first time that juror Eshelman during the trial had been telling the other jurors from time to time that she knew petitioners were guilty and that she knew much more about the case than was being presented.

Improper Selection of Jury

B. Unknown to the defendants, the names of the jurors comprising the jury panel of the Recorder's Court of the City of Detroit were divided alphabetically in three boxes. The jurors called to sit in the case against petitioners were taken from the box containing names of jurors beginning A to H. Petitioners were deprived of the right to have a jury picked from the entire jury panel. By reason of this arrangement, the possibility of juror Eshelman being picked as a juror was increased by 300%.

The selection of jurors from less than the entire panel has been condemned in the case of *Hewitt v. Circuit Judge*, 71 Mich. 287, wherein Chief Justice Sherwood stated that "the selection of the jury, secured to litigants by our Constitution, is of first importance to parties, and they have a right to such jury."

Jury Tampering

C. During the early part of the trial in the Recorder's Court, at least two of the jurors brought to the attention of the trial court the fact that they had been visited by two members of the metropolitan Police Department of the City of Detroit. This tampering with the jury was protested by petitioners and their counsel. The trial court promised to make an investigation, provided petitioners and their counsel would keep the matter secret and waive a mistrial. (See affidavit of Larry S. Davidow, marked Exhibit 2 attached hereto and made a part hereof.) Acting upon this judicial assurance, petitioners waived a mistrial, but it later developed that no investigation was made. Petitioners were thus lulled into a false sense of security by the trial court itself and did not obtain the mistrial to which they were entitled.

Illegal Imposition of Burden of Proof

D. Petitioners show that before the trial, they attempted to have returned to the Society of Good Neighbors the books and records of the Society of Good Neighbors, which also contained the personal files and records of petitioners; that these books and records had been seized by the One-Man-Judge-Grand Jury in February, 1948, and were in his possession or under his control from that time until the present date. Petitioners were unable to properly prepare for the trial and make a proper showing in their defense by reason of the fact that they had no access to the books and records and their own personal files except for short periods of time during the course of the trial, and then, only under the supervision of the police. *Denial of access to the books and records made it impossible for defendants to go forward with the evidence required to meet the shifting theories of criminal liability upon which the*

prosecution was permitted by the trial court to conduct its case.

While petitioners were charged in four counts with conspiracy to cheat and defraud and with gross cheat and fraud, based upon claimed misrepresentations on their part to the effect that the Society of Good Neighbors was a charity, which representations the prosecution claimed were false, the prosecution was permitted to proceed and conduct the trial upon the theory of embezzlement. That the Trial Court accepted this theory of embezzlement is indicated by the following statement made by the Court in denying petitioners' Motion for Directed Verdict made during the course of the trial:

> "Every dollar in cash, every article of merchandise with respect to this organization or the defendants' relation to this organization was acquired from donations with the possible exception of Bingo Games, receipts which might be placed in another category than just donations, but essentially the entire income, whether in cash or merchandise, that was at the disposal of defendant Morrison T. Wade as Managing Director and the one in charge of the Society's activities, came from donations. *That placed the defendants, both of them, being directors of the Society and being apparently the sole controlling authority in the Society, in a position of stewardship with respect to that which was received from the people of Detroit, as a result of the representations made to the people of Detroit concerning the activities of the Society.*" (Italics ours.)

The chief witness for the People, an auditor, admitted that the so-called $750,000 fraud which was charged against the defendants was arrived at by totaling the entire income of the Society of Good Neighbors for the five year period previous to the issuance of the process in June, 1948, without any regard whatsoever for expenses paid out in the conduct of the business of the corporation.

Proceeding on an embezzlement theory, although charging a conspiracy to cheat and defraud and gross cheat and fraud, in which no so-called co-conspirators were ever charged or indicted, the trial court permitted the prosecution throughout the trial to attack additionally the corporate existence of the Society of Good Neighbors collaterally under the claim that it was not a charitable organization, despite the fact that such attack could not be made in a collateral proceeding such as a criminal case. In and of itself this procedure resulted in most unfavorable publicity to the petitioners and denied petitioners a fair trial.

It is hardly necessary to remark on the fundamental unfairness that existed in permitting the state to control a defendant's right of access to those books and records upon which he relies for his defense. Petitioners' position does not materially differ in this respect from that of the children of Israel who were directed to make bricks by a Pharaoh who withheld from them the straw required to do so.

Public Judicial Expression of Guilt

E. Upon the hearing of the motion for directed verdict on behalf of defendants at the close of the People's case, the trial court, in denying the motion, said:

> "All right, the motion is denied. That is, the motion for a directed verdict of not guilty for the following reasons: No. 1. This is directed to Roman Numeral I of the said motion. The Court finds there is proof in the case at bar of a wrongful act on the part of the defendants from which the jury can find the defendants guilty under each of the four counts"
> • • •

Counsel for defendants sought to direct the Court's attention to the fact that newspaper people were making

notations of what was said, which would result in adverse publicity to the defendants and which would undoubtedly be conveyed to the jury. Subsequent newspaper articles appeared in the Detroit newspapers, quoting the trial judge as saying:

> "The court finds there is proof of wrongful acts on the part of the defendants from which the jury can find the defendants guilty of conspiracy" • • •

As appears by the affidavit of Lucile Clark, marked Exhibit 3 hereto attached and made a part hereof, slipping from various newspapers appeared in the jury room from time to time.

In *People v. Bigge,* 297 Mich. 58, the Supreme Court of the State of Michigan condemned the practice of judicial comment on evidence (despite the existence of a statute giving the court authority to make comments upon the evidence) by saying (p. 72):

> "The right of trial by jury is too firmly established in American jurisprudence to allow it to be whittled away by the legislature or by a too liberal construction of statute law by the courts. Once the door is open for allowing the opinion of the court to be impressed upon jurors that one charged with crime is guilty of the offense, the fundamental right of trial by jury is impaired."

The same statute received a similar narrow construction in the case of *People v. Padgett,* 306 Mich. 545:

> "The statute, within proper limits, has a proper place in the criminal procedure of our courts. It must not be given the effect of depriving one charged with crime of the presumption of innocence, nor throw upon him the burden of proof. It is the sole province of the jury to determine the credibility of witnesses, and to pass upon questions of fact. *If even one juror is swayed by the weight of the openly*

expressed opinion of the court, and his verdict thus affected, the right of trial by jury in criminal cases is impaired." (Italics ours.)

Procedural Due Process Denial

F. Before the case came on to be tried, three motions were filed by petitioners: (1) Motion to Quash the Information; (2) Motion for Bill of Particulars, and (3) Motion for Change of Venue.

The record shows that Motion for Change of Venue and the Motion for Bill of Particulars were never heard or passed upon. The then presiding judge in a brief written memorandum denied the Motion to Quash. He immediately thereafter left the City of Detroit to go to Florida, where he has remained ever since. Petitioners sought to have their Motion for Bill of Particulars and Motion for Change of Venue heard. Thereafter, a letter was received from the Judge then residing in Florida, in which he stated that it was his intention to have denied all three motions. This informal letter from Florida was accepted by the Trial Court in complete disregard of the formalities inherent in any judicial proceeding, namely, that courts act only through formal orders. Petitioners were denied even a hearing upon their motion for Bill of Particulars and Motion for Change of Venue, let alone the relief that they were entitled to thereunder.

3. Petitioners further show that although the Legislature of the State of Michigan expressed its policy in Act No. 53 of the Public Acts of the State of Michigan for 1954, which requires the issuance of a Writ of Error as a matter of course in all criminal cases involving the personal liberty of a defendant (which Act did not become effective until August 13, 1954, whereas petitioners' Application for Leave to Appeal had been filed in June, 1954),

the Supreme Court of the State of Michigan summarily rejected petitioners' Application for Leave to Appeal.

4. Petitioners further state that they present this petition to this Court in good faith and not for any purpose of delay, and that they believe that unless a rehearing is granted it will result in a gross miscarriage of justice and that your petitioners will have been deprived of their liberty without due process of law and will have been denied the equal protection of the laws, in violation of the Constitution of the United States.

CONCLUSION

For the reasons hereinabove set forth and in the appeal heretofore filed, it is respectfully urged that a rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Recorder's Court of the City of Detroit, Michigan.

Respectfully submitted,

DAVIDOW & DAVIDOW,
By LARRY S. DAVIDOW,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

LARRY S. DAVIDOW.

EXHIBIT 1

AFFIDAVIT OF KATHLEEN S. FREDE

State of Michigan,
County of Wayne—ss.

Kathleen S. Frede, being duly sworn, says that she lives at 15433 Bentler Avenue in the City of Detroit; that she is the daughter of James E. Dunn, who, for a number of years prior to his retirement in July 1950 was a police officer in the Police Department of the City of Detroit; that up to the time of her marriage on the seventh of July, 1950, she lived with her parents and during the period between 1938 and the time of her marriage lived in the family home at 14015 Whitcomb Avenue in said City of Detroit; that the house to the south, adjacent to said premises was during said period occupied by Willis D. Eschelman and Isobell Eschelman, his wife, and one or more of their daughters; that during the period referred to said Willis W. Eschelman and said Isobel Eschelman called at her home on a number of occasions and deponent's father and mother called at their home on a number of occasions; that a friendly and neighborly relationship existed between their two families for the greater part of the period referred to; that deponent's mother and said Isobel Eschelman frequently visited with each other at their retaining wall between the two homes and said Willis W. Eschelman and deponent's father James E. Dunn, frequently carried on neighborly conversations there with each other during said period; that said Isobel Eschelman called on deponent's mother when she was confined to her house by illness, and showed her many neighborly courtesies; that deponent's father during a year and a half during said

period drove a Police Department Sound Car and parked it in his garage at night; that during said period herein first mentioned, her father wore a blue police uniform and did so on a number of occasions in the presence of said Isobel Eschelman.

Kathleen S. Frede.

Subscribed and sworn to before me this 12th day of January, 1952.

Edmund M. Sloman,
Notary Public, Wayne County, Michigan.
My commission expires August 12, 1952.

EXHIBIT 2

STATE OF MICHIGAN—In the Recorder's Court for the City of Detroit

The People of the State of Michigan, v. Morrison T. Wade and Bessie Lou Tanner Wade, Defendants.	No. A-51843

AFFIDAVIT OF LARRY S. DAVIDOW

State of Michigan,
County of Wayne—ss.

Larry S. Davidow, being duly sworn, deposes and says that he is a member of the law-firm of Davidow & Davidow, attorneys of record for the defendants in the above entitled cause, and that he makes this affidavit in support of the

motion for new trial on behalf of the defendants in the above entitled cause.

Deponent further says that at the time the jury was being impaneled, to wit, January 26, 1951, deponent was furnished a number of jury lists by the Clerk of the Court, one of which was a printed sheet and several were typewritten in form; that by the manner of the calling of the jury, deponent was led to believe that all of the names appearing on all the lists were contained in the jury box then on the Clerk's desk; that not until after the trial had been concluded with the verdict of the jury, did this deponent or anyone connected with the defense, discover or learn that (1) the jury had been divided into three parts and the names of the jury kept in three separate boxes separated alphabetically; (2) that while the courtroom had been filled with prospective jurors on January 26, 1951, numbering more than one hundred fifty, the names called for jury service were called from only one box, covering a list that had a total of only about fifty names; (3) that Box 1 from which were drawn the names of the jurors selected for the above case had not been used for other jury service from January 23, 1951, but was withheld for the purpose of use in "the long case," meaning the Wade case.

Deponent further says that since conclusion of the trial and the verdict of the jury, and for the first time, deponent and others of the defense, have learned that in this jury box Number 1, there were the names not only of those who had been called for service January 2 and January 8 and January 22, but also names of those who were not to be called until February 5, and that all of the names in Box 1 were limited alphabetically to the names beginning with "A" running through "H" inclusively, comprising about

one-third of the entire jury panel; that had this deponent or defendants known of all these irregularities, they would have challenged the array of jurors for cause.

Deponent further says that as he is informed and believes it to be true and charges the fact to be, that the practice in the Recorder's Court for the City of Detroit so far as examining jurors on the voir dire is concerned, is that the lawyers themselves interrogate prospective jurors; that the trial court disregarded this practice of the Recorder's Court and insisted upon examining the jurors himself; that this deponent asked for the opportunity of examining the prospective jurors, which request was denied.

Deponent further says that during the course of the examination, this deponent asked the Court to put the question to the prospective jurors whether any of them was familiar or acquainted with any members of the metropolitan police department of the City of Detroit, and that the Court put the question only in part, as a result of which no proper interrogation was made to discover possible prejudicial attitudes on the part of jurors, with the result that the defendants did not receive a fair trial.

Deponent further says that he is certain that if he had been permitted to interrogate the prospective jurors, he would have discovered that juror Isabel Eschelman not only knew a police officer, but that the said police officer was one James E. Dunn, Jr., a next door neighbor for more than twelve years, and that she was well familiar with him.

Deponent further says that he is certain that if he had been permitted to interrogate the prospective jurors he would have discovered that juror Isabel Eschelman not only knew Walter Kutch, a witness for the People, but that the husband of Isabel Eschelman was then selling real estate in the northwest area of Detroit and that the said

husband of said Isabel Eschelman not only knew Walter Kutch but that he had twice tried to get a job from Walter Kutch in 1950 and on both occasions had been turned down by the said Walter Kutch.

Deponent further says that had the foregoing facts been disclosed, this deponent on behalf of the defendants would have challenged juror Eschelman either for cause or peremptorily.

Deponent further says that as appears by the records of the Police Department and the records of the City Directory, one James E. Dunn, Jr., lived at 14015 Whitcomb Avenue in the City of Detroit and had lived at that address for a number of years up to and including September, 1951; that Isabel Eschelman, one of the jurors in the case, resides at 14007 Whitcomb Avenue in the City of Detroit, next door to the said James E. Dunn, Jr.; that the records of the Police Department show that the said James E. Dunn, Jr. was attached to Judge Gordon's Court in the Recorder's Court in the City of Detroit for several years and was there during all the time that the grand jury proceedings involved in this case were going on and for some time thereafter, and that said James E. Dunn, Jr. was attached to Judge Arthur Gordon's court during the time this deponent had argued the motion to dismiss on behalf of the defendants.

Deponent further says that a few days after the jury had been impaneled in the above entitled cause, and when some testimony had already been heard, all counsel in the case were invited into the private office of the Honorable James R. Breakey, Jr., Circuit Judge sitting in the Recorder's Court, presiding in the above entitled cause; that the Court advised all counsel that a report had been brought to him by a member of the jury concerning the

complaint of a juror that a policeman had called upon her at her home questioning her on matters that had to do with her as a juror in this cause; that the following day or soon thereafter, another juror reported a like experience.

Deponent further says that upon the second occurrence the Court invited the defendants in his private chambers concerning this tampering with the jury by members of the metropolitan police department, and offered to declare a mistrial of the case, although at the same time the Court indicated his desire to proceed with the trial of the case; that the Court at that time and during the various conversations, gave positive assurance that he would make a complete and thorough inquiry into the behavior of the members of the metropolitan police department of the City of Detroit relating to this tampering with the jury; that the defendants declined the offer of a mistrial upon the positive assurance of the Court that a thorough investigation would be made by him and the results made known as soon as possible.

Deponent further says that he urged upon the Court that the inquiry be pursued quickly and fully, and particularly that time was the essence of the inquiry because, as this deponent stated his opinion, the lapse of time would dull the recollection of necessary and pertinent witnesses as to what had occurred, and make it difficult, if not impossible, to ascertain the origin, as well as the author, of this effort to tamper with the jury; that the Court definitely said that such inquiry would be made by him; that the Court enjoined upon all those present the obligation of secrecy in order to prevent unfavorable publicity surrounding the matter.

Deponent further says that counsel for defendants and the defendants themselves scrupulously observed the re-

quest of the Court as to secrecy, particularly because of the Court's absolute promise to make such a full and complete investigation.

Deponent further says that at different times during the course of the trial he inquired of the Court what progress was being made in such inquiry, and that the Court would put him off with vague generalities; that this deponent reminded the Court that the passage of time was working adversely to such inquiry, but the Court did nothing further about it, insofar as this deponent was informed or has ever been informed.

Deponent further says that at no time has the Court, either in chambers or in open Court, made any report of any alleged inquiry and this deponent is led to believe by virtue of the circumstances of the episode that no inquiry or investigation has ever been made by the Court.

Deponent further says that if the defendants or their counsel could have anticipated that no investigation was going to be made, the defendants and their counsel would either have accepted the offer of the Court for a mistrial, or would have formally made a motion for mistrial because of jury tampering.

Deponent further says that it is his opinion that if any such investigation as promised by the Court had been made, the disclosures that have been discovered since the verdict of the jury, concerning what undoubtedly was perjury by one of the jurors concerning her knowledge or acquaintanceship with a police officer and knowledge of the case, in which that particular juror had a pronounced and decided opinion against the defendants, would have been brought out.

Deponent further says that on August 14, 1951, when the Court passed upon a motion made by defendants' counsel on behalf of defendants for a directed verdict of not guilty,

the Court employed language by which he stated a fixed opinion that at that time while the trial was still in progress, there was enough testimony to support a finding of guilt on each of the four counts against both defendants.

Deponent further says that while up to August 14, 1951, the newspaper men had been present very rarely for weeks during the actual course of the trial, usually coming in at the end of the day or at the beginning of the day, on this particular occasion when the Court made the aforesaid statement, representatives of all the Detroit daily newspapers were present taking down the language herein described and which was then complained of by this deponent; that this deponent directly challenged the Court's attention to the impropriety of and the prejudicial effect of the employment of such language by the Court, especially that the words he was then employing would appear the following day in the newspapers, and definitely called the Court's attention to the fact that the jurors were all reading the newspapers and that the probabilities were exceedingly strong that these prejudicial words so complained of would appear in the newspapers and would be read by members of the jury.

Deponent further says that the following day, August 15, 1951, the apprehensions voiced by this deponent as to the newspapers carrying the prejudicial comments of the Court were realized; that articles appeared in all the Detroit daily newspapers, and particularly in the Detroit Free Press and the Detroit News; that as a matter of fact, an adverse article appeared in the Detroit News in the late afternoon of August 14, and another article in the Detroit News in the morning of August 15; that this deponent did at the opening of Court on the morning of August 15, before the jury was called in, direct the Court's attention to the prejudicial language employed by the

Court on the previous day and that it had been quoted with its prejudicial effects in the Detroit Free Press on the morning of August 15 on the first page of the second section; that a copy of this article is hereto attached and made a part hereof, and reference is made to the newspaper itself.

Deponent further says that copies of the articles that appeared in the Detroit News are also attached hereto and made a part of this affidavit.

Deponent further says that he asked the Court Reporter, Burton E. Hahn, to write up the transcript of the incident of August 14, 1951, as well as the incident of August 15, 1951, above described, when this deponent called the Court's attention to what had occurred in the newspaper article; that the transcript for August 14 first furnished this deponent by the Court Reporter, while it contained the prejudicial language of the Court complained of, was absolutely silent on the objections entered by counsel for defendants concerning the language so employed and the fact that it would appear in the newspapers because the newspapermen were then present writing everything down and from which it would also follow that the members of the jury would see it; that thereupon deponent again requested the Court Reporter to furnish the transcript containing the full episode of August 14.

Deponent further says that several days later, deponent received another transcript of proceedings of August 14, 1951, containing the language employed by counsel in his objection to the Court's behavior as above described and complained of, and which, in addition, under the guise of August 14, contained language of what must have occurred the following day, to wit, August 15; that thereupon deponent made another request of the Court Reporter to

furnish the transcript of the episode of August 15, when, before the jury was called in, this deponent did challenge the Court's attention to the fact that his fears had been realized in that the Detroit Free Press of that morning had already carried the story, as shown by the attached exhibit.

Deponent further says that no such transcript was ever furnished but what appears to be part of what occurred on the 15th of August has been run into and made a part of the proceeding of August 14th; that this deponent has repeatedly asked the Court Reporter to furnish a transcript of what occurred in the morning of August 15th; and that at first the said Court Reporter advised deponent that he remembered the event having occurred as deponent described it and that he would again try to find it; that as recently as this week, the Court Reporter said that he remembered the episode and that if he could not find the same in his notes, he would give deponent a statement to that effect; that such promise has not been kept, the reporter furnishing deponent a statement to the effect that his notes are silent on the subject.

And further deponent saith not.

/s/ Larry S. Davidow,

Subscribed and sworn to before me this 13th day of December, A. D., 1951.

/s/ Nell M. Yorgen,
Notary Public, Wayne County, Michigan.
My commission expires November 28, 1953.

EXHIBIT 3

State of Michigan,
County of Wayne—ss.

Lucile Clark, being duly sworn, deposes and says that she resides at 3371 West Outer Drive, Detroit, Michigan, and that she was one of the jurors who sat in the trial of the case of The People v. Morrison T. Wade and Bessie Lou Tanner Wade in the Recorder's Court for the City of Detroit.

Deponent further says that for several days prior to January 26, 1951, the jurors whose names were in Box 1, were not called on any cases in the Recorder's Court and were informed that they were being held for a long case that was about to be called.

Deponent further says that juror Isabel Eschelman was on the panel of jurors whose last day of service would have been January 26, 1951.

Deponent further says that she sat through the said trial until the time the jury retired for deliberation, and that it was her impression that Mrs. Eschelman from the very beginning of the case, had her mind definitely made up as to the defendants' guilt and that she repeatedly made the statement to the jurors, "You don't know the half of it," after testimony had been brought out that was detrimental to the defendants.

Deponent further says that juror Eschelman had lunch almost every day with three other women jurors and almost every day brought lunch down or some gift of food or something, to these other women, as well as to other jurors.

Deponent further says that after the trial of the case had started, juror Eschelman made the statement that her husband was selling real estate in the northwest area of Detroit, although at the time of her examination to serve as a juror, she had stated that her husband was a retired Ford worker, and had said nothing about her husband being in the real estate business.

Deponent further says that toward the end of the trial, by reason of Mrs. Eschelman's questions and attitude against the defendants, this deponent said to Mrs. Eschelman: "Mrs. Eschelman, you had them hung right from the start" and that Mrs. Eschelman said "No" and became very angry at this deponent.

Deponent further says that she first noticed the hostility and antagonism of juror Eschelman toward the defendants when Mr. Kutch was called as a witness for the People.

Deponent further says that after the charge of the Court was given, this deponent was so confused as to the counts and as to what the jury was supposed to do, and as to what the charges against the defendants were, that she was pleased to be excused from the deliberation; and that she knows that several of the other jurors felt the same way about the charge of the Court.

Deponent further says that during the course of the trial she came to the conclusion that it was the duty of the jury to find the defendants guilty; that she can not ascertain where, during the course of the trial, she arrived at such a decision, but that the entire proceeding was such as to make her feel that that was what the jury was there for.

Deponent further says that during the course of the trial from time to time there were newspaper clippings concerning the case being tried, brought into the jury room and passed around among the jurors.

Deponent further says that during the latter portion of the trial, it became her impression, and she arrived at the conclusion, that it was in the rules that the verdict would have to be according to the majority vote of the jury and that the minority would have to abide by the decision of the majority.

And further deponent saith not.

/s/ Lucile Clark.

Subscribed and sworn to before me this 12th day of December, A. D. 1951.

/s/ Nell M. Yorgen,
Notary Public Wayne County, Michigan.
My commission expires November 28, 1953.

OCTOBER 10, 1955.

Decisions Per Curiam.

No. 43. WADE ET UX. *v.* MICHIGAN. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a substantial federal question. *Thurman Arnold* for appellants. *Thomas M. Kavanagh*, Attorney General of Michigan, *Edmund E. Shepherd*, Solicitor General, and *Daniel J. O'Hara*, Assistant Attorney General, for appellee.